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THE LAW OF MUNICIPAL BONDS, 1876.

THE LAW

OF

MUNICIPAL BONDS

BY

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THE LAW

OF

MUNICIPAL BONDS.

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PART I. OF THE POWER OF MUNICIPALITIES TO ISSUE NEGOTIABLE SECURITIES.

SECTION 1. *Extent of Municipal Indebtedness—Comparative Statement here and in Great Britain and Paris, note.*—It is esti-

mated that the municipal indebtedness in this country has already reached the enormous sum of $900,000,000, and it is constantly increasing.[1] A large portion of this indebtedness

[1] 'The Public,' July 27, 1876, page 53, where a list of the debts of sixty-two cities are given, amounting to $618,205,488. The writer concludes his article with these admonitory observations: It "is high time to know how large a burden of indebtedness has been fastened upon the commerce and industry of the country through municipal government. Perhaps a full knowledge of the magnitude of that burden may awaken the tax-payers to prevent its increase, either by constitutional changes, or by reforms in the methods of local government. According to the latest report of the local government board in Great Britain, the indebtedness created for all purposes not national amounts to £92,000,000, or about $460,000,000, having increased about $100,000,000 within three years. In this country, the increase has been over $360,000,000 in six years, or $60,000,000 yearly, in only sixty-two cities and the other municipalities of two states. In the whole country, it has probably been nearly $100,000,000 each year. Our local indebtedness includes $382,000,000 for states, $180,000,000 for counties, and probably $900,000,000 for municipalities; in all $1,462,000,000. It is a mortgage of about five per cent. upon the entire estimated wealth of the country. The interest exceeds six per cent. yearly. The annual tax upon industry and commerce exceeds $90,000,000 for interest on local debt alone."

It thus appears that although our taxable property and resources are much less than those of Great Britain, our local debt is at least twice as large.

Recently the city of Paris, having proposed a new loan, the Economiste Francaise reviewed the growth of the debt of that city, and it appears that municipal extravagance is not confined to this side of the Atlantic. "The figures show," says the London Economist, alluding to the subject, "how the desire, partly to beautify the great city, and partly to give employment to its turbulent population, has led successive *regimes* to add extravagance to extravagance. In the first year of the rule of Napoleon as first consul, the expenditure of Paris was no more than 11,216,000 francs, or $2,223,200; in the last year of the first empire, the sum had grown to 33,483,000 francs, or $6,696,600. In fifteen years, that is, the expenditure of the city had trebled. The two invasions of 1814 and 1815 imposed heavy fines and an immense outlay upon Paris, which raised the expenditure for 1815 to the enormous sum of over 78,000,000 francs, or $15,600,000.

"But in the first year of the Restoration, the outlay was again reduced to 36,000,000 francs ($7,200,000), or not very much more than the sum spent in 1814. The elder Bourbons and their advisers had a lively recollection of the influence exerted on the Revolution by the disorder into

is evidenced by *negotiable bonds*, which are held by thousands of persons, at home and abroad, as an investment. These bonds have been issued for a great variety of purposes, such as the erecting of public buildings, the making of municipal improvements, and in payment of subscriptions for the stock of railway corporations, or as donations to aid them in the construction of their roads located in or near the municipality or public corporation thus extending its assistance.

SEC. 2. *Effect of power to issue municipal commercial securities for public improvements — Stimulus to extravagance — Abuse of power—Repudiation.*—The power conferred upon municipal and public corporations to issue *commercial securities* for such purposes is of comparatively recent origin, and it has, undeniably, been attended with very serious, and it is perhaps not

which the finances had fallen under Louis XVI, and therefore they practised economy in the administration. Accordingly, we find that in the last complete year of Charles X, 1829, the expenditures had risen only to 48,000,000 francs ($9,000,000). Instead of trebling, as under the First Napoleon, in a nearly equal period of time under the Restoration the increase was only one-third. But with the government of Louis Philippe, we find a somewhat augmented outlay. In 1847 the expenditure had risen to 64,000,000 francs ($12.800,000), it having been no more than 40,000,000 francs ($8,000,000) in 1830.

"It was, however, under the second empire that extravagance gained free scope. We all remember the great works carried out by Baron Haussmann, the disregard of all financial rule, and the mystifications practised in the accounts. Even before the rise of Baron Haussmann, however, the expenditure swelled inordinately. In 1852, including the special as well as the general funds, it had grown to 102,000,000 francs ($20,400,000), or 38,000,000 francs ($7,600,000) more than in 1847. And in 1869 it had actually reached 346,000,000 francs, or $69,200,000. Thus, as under the First Napoleon, the expenditure had more than trebled in a single reign. Furthermore, we see that, during the twenty years from the accession of the first consul to the breaking out of the war with Germany, the expenditures of Paris had been multiplied about thirty-one times, from less than £450,000 to nearly £14,000,000 sterling ($70,000,000). Since the restoration of order, the attention of the government has been given to the enforcement of economy. But the minor debts upon the city have allowed of only a small measure of success being attained. In the present year, the expenditure is estimated at 305,000,000 francs, or $61,000,000."

As to coupon bonds, see Daniel on Neg. Instr. sec. 1486, *et seq.*

too strong a statement to add, disastrous, consequences, the end of which is not yet. One of these is the stimulus which the long credit commonly provided for effectually supplies, to over-indebtedness. The bonds usually fix a time, twenty or thirty years distant, for payment of the principal. Those who vote the debt, and the councils or bodies which create it and issue the bonds, do so without much hesitation, as the burden is expected to fall principally on *posterity*. A learned justice of the Supreme Court of the United States has very fitly described the effect witnessed as a *mania* for running in debt for public improvements.[2] It has elsewhere been characterized as an "epidemic insanity" inducing extravagant corporate subscriptions to public works.

In many parts of the country, and particularly in the west, this mania has become general in cities, counties, townships and school districts, and large and burdensome debts have been thoughtlessly created. The writer has known new counties in a western state, not containing over 10,000 inhabitants, vote, for a single railway, bonds to the amount of $300,000, drawing ten per cent. interest, payable annually, and instances are not infrequent where bonds have been issued greater than the assessed value of all the taxable property at the time, within the municipal or territorial sub-division. No check against the incurring of over-indebtedness is so effectual as the one *that you must pay as you go*, but this is wholly disregarded in the legislation which authorizes bonds payable at a remote period. Another serious consequence of this policy is, that even the *interest* on these bonds often proves to be a heavy burden upon the community, and in many instances the bonds have been issued fraudulently by the public or municipal officers, and no consideration, or none of value, has been, in fact, received therefor. They may, indeed, have the stock of the railway company, but in most cases, under the prevailing mode of constructing railways, the stock is utterly valueless. When the sting of taxation is felt, and when the tax-payer knows that the bonds were fraudulently issued, and even when

[2] Mr. Justice Davis.

he feels that they were improvidently given, experience shows that repudiation, or attempted repudiation, is the next stage, involving a forfeiture of the public faith pledged for their payment. Occasionally it has been witnessed that the *state*, in all its departments, has actively sympathized with the repudiating municipality, and the public faith has been redeemed only through the coercion of the Supreme Court of the United States. In a few instances, indeed, the *states* have set the example of repudiating their own obligations issued in aid of railways; and it was only last winter, in a case of this kind, that the Supreme Court at Washington felt itself bound to declare "that the faith of the state, [of Minnesota] solemnly pledged, has not been kept; and were she amenable to the tribunals of the country, as private individuals are, no court of justice would withhold its judgment against her."

Examples of this kind are demoralizing, and cannot safely become general or frequent.

SEC. 3. *Scope and nature of this paper—The law of Municipal Bonds as developed in the Federal Courts.*—The policy of burdening the future has been sanctioned by the legislature, and the courts have to deal with the legal rights of the municipality on the one hand, and the holders of its obligations on the other. The determination of their legal rights involves enquiries as complicated as they are important. The law on this subject is substantially the growth of the last twenty-five years. The decisions in the various State and Federal courts are very numerous, and on some points conflicting. The writer has treated the subject elsewhere,[3] and does not in the present article intend to reproduce what is there said, or refer to it, except where it will serve to illustrate or abridge the present discussion. It is impossible, were it even desirable, to compass within the limits of a single article all the learning, and to refer to all the cases, upon the subject of municipal securities. It will not be attempted. By reason of the greater favor with which the rights of the holders of such securities have been regarded by the Supreme

[3] Municipal Corporations, chaps. 14, 20.

Court of the United States, the volume of municipal bond litigation has of late years taken place in the Federal courts.

The present article will be devoted mainly to a consideration of the law on this subject as determined by the Supreme Court of the United States; and our object will be to show exactly the doctrines and principles which have received the sanction of that tribunal, and to illustrate, as far as needful, their application in particular instances, giving prominence to several important decisions made at the last term, not yet officially reported, and referring incidentally or for further illustration to the decisions of the State courts on the subjects or topics discussed.

The Supreme Court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint against repudiation, even when made on legal grounds deemed solid by the State courts, by municipalities which had been deceived and defrauded. That such securities have any general value left is largely due to the course of adjudication in respect thereto by the Supreme Court, and the reliance which is felt by the public that it will stand firmly by the doctrines it has so frequently asserted.[4]

SEC. 4. *Taxation limited to* PUBLIC *purposes—What are such —Aid to railways—Bonds to be paid by taxation for what purposes authorized.*—After the numerous decisions by courts of the highest authority, it may now be regarded as a settled doctrine of American law that no tax can be authorized by the legislature for any purpose which is essentially *private:* or, to state the proposition in other words, for any but a *public purpose.*[5] What is a public purpose may not always be

[4] As to the general tone, spirit and effect of the decisions of the Supreme Court concerning municipal securities, see Dillon, Munic. Corp. (2d Ed.) sec. 415, *et seq.*

[5] Loan Asso. v. Topeka, 20 Wall. 655; Curtis v. Whipple, 24 Wis. 350; Whiting v. Fon du Lac, 25 Wis. 167; Allen v. Inhab. of Jay, 60 Maine, 124; Jenking v. Andover, 103 Mass. 94; Lowell v. Boston, 111 Mass. 454; Pray v. Northern Liberties, 31 Penn. St. 69; Matter of Mayor of New York, 11 Johnson, 77; Camden v. Allen, 2 Dutcher, 398; Sharpless v. Mayor of Phila., 21 Penn. St. 147; Hanson v. Vernon,

easy to determine; but when determined, it constitutes the boundary of the power of taxation. Whether taxation to aid in the building of railways owned by private corporations is taxation for a *public* purpose, is a question which has been discussed and decided by the courts of last resort in almost every state in the Union, and by the Supreme Court of the United States.[6] Although the doctrine of the constitutionality of such taxation has been vigorously resisted and combated, still it must be admitted that the great preponderance of the judicial judgments has been on the side of the competency of such legislation, in the absence of special constitutional restraint.[7] And therefore the legislature may authorize subscriptions by municipalities to the stock of railway corporations, or donations to them, and provide for the payment of such subscriptions or donations by the issue and sale of the negotiable bonds of the municipality. But a statute which authorizes the issue of bonds to be paid by taxation to aid certain individuals or classes, or in aid of the *manufacturing enterprise* of individuals or private corporations, is void—this being within the meaning of the rule, a *private*, as distinguished from a *public* purpose, although in a remote or col-

27 Iowa, 47; Cooley, Const. Limit., 129, 175, 48; Dillon, Munic. Corp., sec. 587, and cases cited; Cooley on Taxation, chap. IV, "where the purposes for which taxes may be laid" are enumerated, and illustrated by the adjudicated cases.

[6] The cases are collected, Dillon's Munic. Corp. (2d Ed.), secs. 104, 105: Rogers v. Burlington, 3 Wall. 654; Supervisors v. Schenck, 5 Wall, 772, 779; Olcott v. Supervisors, 16 Wall. 678; Railroad Co. v. Otoe Co., 16 Wall. 667; Loan Asso. v. Topeka, *supra;* Township of Pine Grove v. Talcott, 19 Wall. 666. 1873.

[7] In Pine Grove Township v. Talcott, 19 Wall. 666, 677, Mr. Justice Swayne says that such legislation has been sustained in nineteen out of twenty-one states. As respects legislative power, *donations* and subscriptions for stock stand on the same ground. Town of Queensbury v. Culver, 19 Wall. 83. 1873.

If it be allowable to judge of a legal principle by its fruits, the dissenting and minority judges on this question will find much to confirm the conviction that their views were sound. But it is useless to fight that battle over again; it has been fought and lost. All that is left is the contemplation and contrast of what might have been and what is.

lateral way the local public might be benefited thereby.[8]

The execution of the powers ordinarily conferred upon municipal corporations, such as improving highways and streets, constructing water works, gas works, markets, preserving the public health, and the like, are of course public purposes,[9] and upon legislative authority being given, negotiable bonds may be issued therefor. What will constitute sufficient authority for the issue of such bonds will be considered further on.

SEC. 5. *Two great classes of Municipal Securities: 1. Ordinary warrants; 2. Negotiable bonds—Form, execution, and attributes of each.*—It is material to bear in mind the *different kinds* of corporate evidences of debt. These are of two general classes. FIRST, *there is the usual municipal or county warrant or order.* These are commonly drawn by one or more of the officers upon the treasurer, directing him to pay to the person named or *bearer* a given sum of money. The power to issue them, and the mode in which it is to be exercised, are usually prescribed by charter or statute. They are vouchers or "necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes,"[10] out of which they must be paid.

It is, perhaps, true that the power to issue such warrants or orders may, where not expressly conferred or denied, be *implied* as incidental to carrying out the objects of a munici-

[8] Loan Asso. v. Topeka, *supra*. And they are incapable of municipal or legislative ratification. *Ib.* Commercial Bank v. Iola, 2 Cent. Law J. 167. Same cases below. 2 Dillon's C. C. R. 353; 3 Dillon's C. C. R. 376. Same principle. Lowell v. Boston, (aid to enable citizens to rebuild houses destroyed by a large fire,) 111 Mass. 454, 1873; Allen v. Jay, (aid to construct mills,) 60 Maine, 124, 1871. The cases cited in this note were approved in The State etc. v. Osawkee Township, 14 Kansas, 418, 1875, in which the Supreme Court of Kansas held an act whose object was to provide the destitute with provisions and with grain for seed and feed, and to issue bonds for that purpose, unconstitutional, because not issued for a *public* purpose.

[9] Cooley on Taxation, chap. 4, p. 67, *et seq.*; Daniel on Nego. Instr., § 1522, and cases cited; Dillon, Mun. Corp. *passim*.

[10] *Per* Bradley, J., in The Mayor of Nashville v. Ray, 19 Wall. 468, 477. 1873.

pal or public corporation. Such instruments issued by municipal and public corporations, by usage, are generally treated as negotiable in the sense of being transferrable by delivery, and in most of the states the transferee or holder may enforce payment by suit or by *mandamus* in his own name.[11] But it is a mistaken notion, and one which has no support in reason or policy, and but little in the adjudications, that they are either commercial paper or possess the attributes of such paper.

On the contrary, in whosesoever hands they may be, or at whatever time purchased, whether with or without notice, they are always open to any defence which might have been made against the payee or original holder.[12] The fundamental idea is that they are *not* commercial securities, and are not governed by the rules of the law merchant in respect of negotiable instruments.

SECOND, *there is the municipal bond, negotiable in form*, payable at a future day, intended for sale in the market, issued under *express* authority of the legislature. These, notwithstanding they are under seal, are clothed with all the attributes of negotiable or commercial paper, pass by delivery or endorsement, and are not subject to equities, (where the power to issue them exists,) in the hands of holders for value, before due, without notice. This has ceased to be a disputed point, and the cases adjudging or recognizing this principle in the state courts are very numerous.[13] Such bonds usually have

[11] The cases on the point are cited in Dillon on Munic. Corp. § 406, note. *Infra*, § 28.

[12] The Mayor etc. v. Ray, 19 Wall. 468, 477, 478; Dillon, Munic. Corp. sec. 406, where the cases are collected.

[13] Mercer Co. v. Hacket, 1 Wall. 83, 1863, and other cases cited in Dillon on Munic. Corp., § 405, note; Daniel on Nego. Instr., § 1500, and cases there cited.

Form of Bond—Condition.—Municipal bonds, in the usual form, containing words of negotiability, with coupons attached, are absolute, and not conditional, promises to pay, and hence are negotiable with all the incidents of negotiability, notwithstanding they contain the following recital: "This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of the same through the said township, in pursuance of and in

coupons attached, which partake of the nature of the bond, are likewise negotiable, may be detached and held separately from the bond, and the holder may sue thereon in his own name, without producing or being interested in the bonds to which they were originally attached.[14]

accordance with an act of the legislature of the state of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25, 1870;' and for the payment of the said sum of money and accruing interest thereon, in manner aforesaid, *upon the performance of the said condition*, the faith of the aforesaid Humboldt township, as also its property, revenue and resources, is pledged," the court holding that the construction of the road through the township was not a condition upon which payment was to be made. Humboldt Township v. Long, U. S. Sup. Court, Oct. Term, 1875, 3 Cent. Law Jour. 494.

In giving its judgment, the court says: "Relying upon this clause of the certificate the township contends that the construction of the railroad through the township was a condition upon which the payment was agreed to be made. We think, however, this is not the true construction of the contract. The construction of the road as well as the subscription for stock were mentioned in the recital as the reasons why the township entered into the contract, not as conditions upon which its performance was made to depend. It was for the purpose of subscribing, and to aid in the construction of the road, that the bond was given. The words, 'upon the performance of the said condition,' cannot, then, refer to anything mentioned in the recital, for there is no condition there. A much more reasonable construction is that they refer to a former part of the bond, where the annual interest is stipulated to be payable at a banker's, 'on the presentation and surrender of the respective interest coupons.' Such presentation and surrender is the only condition mentioned in the instrument. But that stipulation presents no such contingency as destroys the negotiability of the instrument. It is what is always implied in every promissory note or bill of exchange, that it is to be presented and surrendered when paid. As well might it be said that a note payable on demand is payable upon a contingency, and therefore non-negotiable, as to affirm that one payable on its presentation and surrender is, for that reason, destitute of negotiability." See, also, Hotchkiss v. National Bank, 21 Wall. 354, 1874. *As to form of bonds, seal, place of payment and delivery*, see cases cited Daniel on Neg. Instr., §§ 1492–1499.

Power to *substitute* other bonds. Lynde v. County, 16 Wall, 6; McKee v. Vernon Co., 3 Dillon C. C. R. 210.

[14] Thompson v. Lee Co., 3 Wall. 327; Dillon on Munic. Corp. § 405, note; Kennard v. Cass Co., 3 Dillon C. C. R. 147, 1874; Daniel on Neg.

SEC. 6. *As to the implied power to borrow money and issue commercial or negotiable paper.*—Much conflict of opinion has existed in the American courts touching the *implied power* of public and municipal corporation *to issue commercial or negotiable instruments*, that is, instruments free from equities in the hands of innocent holders for value. In respect of *public* or *quasi* corporations, such as counties, etc., as distinguished from *municipal* corporations proper, the general current of authority is against the proposition that, as ordinarily organized, they possess any such implied power. And the power is not incident to the authority to make specified expenditures or improvements, but it may be implied, where there is nothing to rebut it, from other powers, such as the express power to borrow money.[15]

But in view of the more complex and diversified powers

Instr., § 1509, and cases cited. The proposition of the text is not a disputed one, and coupons, when disconnected from the bonds, have an independent existence. Clark v. Iowa City, 20 Wall. 586; Daniel on Neg. Instr., § 1510.

Coupons—Form of Instrument.—Maker suable thereon in assumpsit, where the bonds are made by the defendant corporation and refer to the coupon, though the latter, signed by the agents of the corporation, is in the form of an order or check on a bank named therein. Town of Queensbury v. Culver, 19 Wall. 83, 1873. Cases as to the form of coupons, see Daniel on Neg. Instr., §§ 1492–1496. May be made payable *beyond limits of the state*, unless specially restrained by statute. Lynde v. County, 16 Wall. 6.

How signed.—The coupons, where the bonds are properly signed and sealed, may be *signed by a printed fac simile* of the maker's autograph, adopted for the purpose, although there is no statute authorizing it. Pennington v. Baehr, (Sup. Court of Cal.,) 2 Cent. Law Jour. 92. See McKee v. Vernon Co., 3 Dillon C. C. R. 210; Lynde v. County, 16 Wall. 6.

[15] Police Jury v. Britton, 15 Wall. 566, 1872. The ordinary powers possessed by counties, as agencies of the state in the administration of public affairs, do not give the incidental power to issue negotiable bonds and coupons. "It would be an anomaly, justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local administration, to become fountains of commercial issue, capable of floating about in the financial whirlpool of our large cities." Id. *per* Bradley, J. See Lynde v. County, 16 Wall. 6.

Distinction between *public* and *municipal* corporations, in the sense referred to in the text, see Dillon on Munic. Corp. secs. 10, 30, 33, 39.

usually conferred upon chartered or municipal corporations proper, there has been a stronger tendency on the part of the courts to hold that such corporations, as usually existing in this country, have an incidental or implied power to issue commercial securities. The line of argument is substantially this: — Trading and commercial corporations have this power as an incidental means of effecting their objects; why not municipal corporations as well? Municipal corporations are clothed with large powers, which necessarily oblige them to use credit or to create debts: therefore, if they may create debts, they may borrow the money to pay them, and if they may borrow money, they have the incidental power to do like other borrowers, namely, give a negotiable bill, note or bond therefor. The whole argument, in our judgment, is unsound. It is true, that in this country private business corporations are usually considered to have the incidental power to borrow money or give negotiable paper as an evidence of their indebtedness, but in England it is held that express power is necessary to enable even railway corporations to draw, endorse or accept bills of exchange.[16] But admit that the American doctrine is otherwise,[17] and that it is rightly so, still their is no resemblance between private and public or municipal corporations in this regard. The latter are simply agencies of government. They are not organized for trading, commercial or business purposes. They have, in general, but one mode of meeting their liabilities, and that is by taxation, and it is upon this resource that creditors must be taken to rely. For hundreds of years in England, such corporations have existed, without it ever being contended that they could, without express authority, issue commercial paper. Private corporations are much more vigilant and watchful of their interests than it is possible for public or municipal corporations to be. The frauds which unscrupulous officers will

[16] See observations of Byles, J., in Bateman v. Mid-Wales Railway Co., Law Rep. 1 C. P. 510, 1866.

[17] Stratton v. Allen, 16 N. J. Eq. 229; McCullough v. Moss, 5 Denio, 567; Straus v. Eagle Ins. Co., 5 Ohio St. 59; 2 Kent's Com. 229; 1 Parsons' Notes and Bills, 165.

be enabled successfully to practise, if an implied and unguarded power to issue negotiable securities is recognized, and which the corporation or the citizen will be helpless to prevent, is a strong argument against the judicial establishment of any such power. And the argument is unanswerable, when it is remembered that in ascertaining the extent of corporate powers, there is no rule of safety but the rule of *strict* construction, and that such an implied power is not necessary, however convenient it may be at times, to enable the corporation to exercise its ordinary and usual express powers, or to carry into effect the purposes for which the corporation is created. We regard as alike unsound and dangerous the doctrine that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and as *incidental* to that, the power to issue commercial securities. The cases on this subject are conflicting, but the tendency is towards the view above indicated. The opinion of Mr. Justice Bradley, in a case before referred to,[18] evinces a thorough comprehension of the whole question, and, in our judgment, is sound in every proposition it advances, and must become the law of this country. This view is confirmed by the almost invariable legislative practice in the states to confer, when it is deemed expedient, upon municipalities and public corporations, in *express* terms, the power to borrow money or to issue negotiable bonds or securities, and it is of instruments thus authorized that the present article designs principally to treat. It is an admitted and undisputed doctrine that the power of public and municipal corporations to subscribe to the stock of railway companies and issue bonds therefor must be *expressly* conferred.[19]

[18] The Mayor v. Ray, 19 Wall. 478, 1873. It is difficult to understand on what ground the dissenting judges in this case regarded the corporation *warrants* as "negotiable securities of a commercial character." The cases are almost uniform that such instruments do not partake of the nature of commercial paper, except that by usage and custom, and sometimes by legislative enactment, they pass by delivery. *Supra*, sec. 5, and authorities there referred to.

[19] The cases on this point are collected in Dillon's Munic. Corp. sec. 106, note.

SEC. 7. *Want of power, always a defence—Question of power is the one of chief interest and importance.*—Touching the rights of the holder of authorized negotiable municipal securities, it may be observed here as introductory to what follows, that such instruments are *commercial paper*, and governed by the rules of the law merchant concerning such paper, and that as respects a holder for value, before due, without notice of facts constituting a defence thereto, the only defence which is available is, that there was *no power* in the defendant corporation to issue the bonds or instruments in question. This principle is thus expressed in one of the judgments of the Supreme Court: "Bonds, payable to bearer, issued by a municipal corporation, * * if issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but if issued by such a corporation which possessed *no power* from the *legislature*, they are invalid, even in the hands of innocent holders."[20] *Irregularities* in the exercise of the power, as against a holder for value, without notice of such irregularities, constitute no defence. Since, therefore, *want of power* is the *only* defence open to the corporate maker of such instruments, when they have been negotiated (as almost invariably is the case for value to innocent holders), the question of *power* is the one around which the principal interest centers, and to which, in its various phases, we shall give our main attention. And concerning this subject, obviously, the essential enquiries are, *when* the power exists or arises; *who* is to decide whether it existed or had arisen when the bonds were issued; and what will *estop* the corporation to set up non-compliance with antecedent or preliminary conditions, and it is these enquiries that we shall examine and illustrate chiefly by reference to the decisions of the Supreme Court of the United States, noticing incidentally the decisions of the State courts.

[20] *Per* Clifford, J., in St. Joseph Township v. Rogers, 16 Wall. 644, 659, 1872. As nearly all the cases in the Supreme Court have turned on the question of power, it is not deemed material to cite them in this connection, as the propositions in the text are no longer the subject of judicial controversy.

SEC. 8. *Different classes of bonds — Implied and express power to issue—Recitals—Mode of pleading, see note.*—Negotiable securities of the kind here referred to have been issued by *municipal corporations proper* (generally under an *express* power to aid railways, or for gas works, water works or specified local improvements, but sometimes under an *implied* power), and *by counties*, usually under express power (generally to aid railways, or for public buildings, bridges or improvements[21]), and *by organized townships* which are parts of counties, under express authority, and usually as a means of aiding the construction of railways, and *by school districts*, under express power to raise money to erect school-houses. In some of the Western states, counties have been legislatively made the agents for the inhabitants of non-incorporated

[21] In several of the states power is given to municipalities or counties to issue bonds to *aid* works of "*internal improvement*." And under this generic term, the question has arisen, what are works of internal improvement? The Supreme Court of Alabama, in defining the phrase "internal improvements," says: "Where internal improvements under state authority are spoken of, it is universally understood that works within the state by which the public are supposed to be benefitted are intended; such as the improvements of highways and channels of travel and commerce." Mayor *et al.* of Watumpka v. Newton, 23 Ala. 660.

The legislature of Nebraska passed an act "That any county or city in the state of Nebraska is hereby authorized to issue bonds to *aid* in the construction of any railroad or other work of *internal improvement*, to an amount to be determined by the county commissioners of such county, or the city council of such city, not exceeding ten per cent. of the assessed valuation of all taxable property in said county or city, *provided* the county commissioners or city council shall first submit the question of issuing bonds to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the Revised Statutes of the state of Nebraska, for submitting to the people of a county the question of borrowing money." Session Laws of 1869, page 92.

Under this act, a county and a precinct issued bonds to build a bridge across the Platte river, and on an application by a taxpayer to restrain the collection of taxes levied to pay interest on such bonds, the Supreme Court of Nebraska, construing the above act in the light of the legislation of the state, held that a *bridge* was a work of "internal improvement" within the meaning of the statute, and that under the power to *aid* the county might itself construct the bridge. Union Pacific R. R. Co. v. Colfax County, 3 Cent. Law Jour. 287; s. c. 4 Nebraska, 450, 1876.

townships, and in Missouri for "strips of territory" to issue bonds in the name of the county, but to be paid out of the property within the specified township or designated territorial limits or strip of country.[22] Reference is made to this subject here, in order to observe that where the bonds or securities are issued under an express power, the legislative act, being the source of the authority, measures and limits the power it confers, and the same principles apply to the instruments issued under it by *any* of these classes of corporations, or *quasi* corporations. But in respect to all these corporations and *quasi* corporations, except, possibly, municipal or chartered corporations proper, we suppose that there is no solid ground to contend that they have any inherent or general power to issue commercial securities, and can only do so by virtue of express legislative authority, which *must* exist in fact, and which ought regularly to be recited in the bond. And in respect to municipal or chartered corporations, our opinion, as indicated in a preceding section, is that they also have no such inherent power, and no power whatever except so far as conferred expressly or by fair implication. This is an important principle, and it results from it that there is no presumption in favor of the power to issue such securities, especially on the part of *quasi* corporations, and it would seem to follow from it that if the bonds of such coporations contain no recital as to the authority for their issue or their purpose, there would be no presumption in favor of their validity, and it would devolve on the holder to aver and show by evidence *aliunde* that the bonds were issued for some purpose authorized by statute. And hence also, *as a matter of pleading*, the authority or power to issue the bonds in suit ought to appear on the face of the declaration, or by some recital in the bonds made part thereof; that is,

[22] Construction of the Missouri *township* railway aid act of March 23, 1868, and the rights and remedies of the bond-holder. Jordan v. Cass Co., 3 Dillon, C. C. R. 185; Same v. Same, Id. 245; Washburn v. Cass Co., Id. 251; Harshman v. Bates County, Id. 150; s. c., in supreme court, Oct. Term, 1875. 3 Cent. Law Jour. 367, referred to at large *infra* sec. 19. Construction of *Kansas* legislation, Thayer v. Montgomery Co., 3 Dillon, C. C. R. 389, and note.

it should thus appear that they were issued for some purpose authorized by statute.[23]

[23] Thayer v. Montgomery Co., 3 Dillon, C. C. R. 389, and note; Kennard v. Cass County, Ib. 147; Nashville v. Ray, 19 Wall. 468.

Mode of declaring on bonds and coupons. Kennard v. Cass County, 3 Dillon, C. C. R. 147, and cases cited in note on p. 150; Thayer v. Montgomery County, *supra.*

Mode of pleading defences. The plea of the *general issue* in *assumpsit* in states where that mode of pleading is yet allowed, puts in issue the question of the authority of the officers to issue the bonds and the *bona fides* of the plaintiff, but presumptively the plaintiff is a holder for value before maturity, without notice; the contrary must be shown by the defendant. Chambers County v. Clews, 21 Wall. 317, 1874; Pendleton County v. Amy, 13 Wall. 297. Special plea erroneously held bad, considered as amounting to the general issue, and as the erroneous ruling was harmless, the judgment was not reversed. Ib.

Answer denying that plaintiff is the *owner, holder or bearer* of the coupons in suit good on general demurrer. Pendleton County v. Amy, 13 Wall. 297.

Proof of execution of bond when denied under oath. Under the legislation of Alabama, *non assumpsit* does not involve the *factum* of the bonds. Chambers County v. Clews, 21 Wall. 317, 1874.

Corporation may plead *nil debet* and *non est factum.* Grand Chute v. Winegar, 15 Wall. 355, 1872.

Remedy at law. Corporation cannot be relieved against bond in equity if the ground for relief shows complete defence or an adequate remedy at law. Grand Chute v. Winegar (case in equity), 15 Wall. 373.

The *statute of limitations* commences to run on coupons *detached* from the bonds and negotiated separately, from the time the coupons mature, and the operation of the statute, in such a case, is not deferred until the maturity of the bonds to which the coupons belonged. This point has been expressly adjudged by the Supreme Court in Clark v. Iowa City, 20 Wall. 583, 1874, and the prior decisions which had been supposed to hold otherwise, explained to mean only that when the bonds were specialties, the coupons, though detached, partook of the same nature, and therefore the same statute of limitations applied to both the coupons and the bonds; that is, if the bonds were specialties, so were the coupons, and the statute of limitations as to sealed instruments, and not the more restricted statute applicable to simple contracts, applied. Kenosha v. Lamson, 9 Wall. 477; Lexington v. Butler, 14 Wall, 282. Whether the statute commences to run on *unsevered* coupons from the date of their maturity has not been decided by the Supreme Court. As to *limitation statutes*, see De Cordova v. Galveston, 4 Texas, 470, 1849; Underhill v. Trustees, 17 Cal. 172; Baker v. Johnson County, 33 Iowa, 151.

SEC. 9. *Condition precedent to exercise of power—Popular vote—Non-compliance with condition precedent—Recital—Restraining issue of bonds.*—Generally, the power of the municipality, county or other local civil sub-division of the state, to subscribe for the stock of railway companies and issue bonds in payment, is conferred upon certain officers, not absolutely, but on the *condition* of a previous approving popular vote, or the assent of a majority or of some greater proportion of the resident tax-payers. If this sanction is given, then the officers, by the usual legislation, are authorized to make the subscription and to issue bonds in payment therefor. A very common defence to such bonds consists in a denial that the condition precedent, *i. e.*, the approving vote, the assent of the tax-payers, or whatever else it may be, has, in fact, been complied with, and hence, as contended, the power to issue the bonds did not exist, or never arose.

Where the legislation is of this character,—namely, requiring compliance with some such condition before issuing the bonds,—the Supreme Court of the United States does not hold, as we understand their decisions, that the power can be rightfully exercised unless the condition precedent has been performed. As between the immediate parties, the municipality and the railroad company, doubtless, the enquiry is open, and fully open, whether the condition on which the rightful exercise of the power depends has been complied with, and if it has not been, on due application, the issue of the bonds will be enjoined,[24] or if they are in the hands of the original party or of holders with notice, an action to enforce the bonds may, if no estoppel exists, be successfully defended.[25]

In such a case, there is no legal ground for maintaining that the action of the local officers in issuing the bonds, or any

As to rights and title of purchaser of coupons *overdue*, Arents v. Commonwealth, 18 Gratt. (Va.) 750; Daniel on Neg. Instr., secs. 1505, 1506.

[24] As to the duty of enjoining the issue of bonds on the pain of being estopped to set up irregularities in the exercise of the power, see *infra*, sec. 23.

[25] Chambers County v. Clews, 21 Wall. 317, 321, 1874.

recital they may make therein, will conclude the question whether the condition precedent has been performed. And there is no decision of the Supreme Court of the United States in conflict with this statement of the law, but several which support it.[26]

SEC. 10. *Estoppel by recital to show non-compliance with conditions precedent—Knox County v. Aspinwall.*—When the bonds have been issued and sold in the market, and, before maturity, have come for value, and without notice, into the hands of innocent holders, another element of great importance may, according to the doctrine of the Supreme Court, be introduced into the transaction, as respects compliance with conditions precedent,—*the element of estoppel.* This is so important in its practical relations to the subject as to require careful and minute consideration. Conceding that the rightful exercise of the power to issue the bonds depends upon a condition precedent, for example, a popular vote in favor of the proposition, *when, how and by whom is it to be ascertained whether the condition precedent has been performed.*

Is it to be ascertained, once for all, before the bonds are issued? Or is it open to enquiry and contestation in every action upon a coupon or bond? Is the municipality estopped, in favor of a *bona fide* holder of the bonds, from setting up this defence? and in what cases will the estoppel be available in favor of the holder? These are grave questions, and cases involving them have been frequently before the Supreme Court —the first and leading case being The Commissioners of Knox County v. Aspinwall.[27] The case just cited has been fre-

[26] Chambers County v. Clews, *supra.* That court has several times adverted to the duty of the corporation or tax-payer to interfere by injunction to restrain the issue of bonds where the statute has not been complied with. *Injunction lies to restrain issue of bonds* where there has been a material departure from the statute. Union Pacific R. R. Co. v. Lincoln County, 3 Dillon, C. C. R. 300, 1873; Same v. Merrick, Ib. 359; Railroad Co. v. Hartford, 58 Maine, 23; Dillon, Munic. Corp. (2d Ed.), sec. 108, and cases cited. "In cases arising *before* the issue of the bonds, estoppel has no place, and the sound doctrine is, that compliance with all substantial or material conditions is essential." Ib.

[27] Commissioners of Knox County v. Aspinwall, 21 How. 539, 1858.

quently referred to and followed, and one of the two grounds on which it rests, if not, indeed, both of them, still has the approval of the court, as will be seen by one of its most recent judgments.[28]

The case of Knox County v. Aspinwall, and the numerous cases in the Supreme Court which had followed it down to 1873, were considered by the writer of the present article to establish the following principle: "If upon a true construction of the legislative enactment conferring the authority (viz. to issue municipal bonds upon certain conditions), the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their determination of a matter *in pais* which they are authorized to decide, will, in favor of the bondholder for value, bind the corporation."[29]

"This," says Mr. Justice Strong, in one of the latest cases, after quoting the above language, "is a very cautious statement of the doctrine" of the Supreme Court. And he adds, "It may be re-stated in a slightly different form. Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and

The reader will find a brief but careful statement of this case (which we omit here to save space) in Dillon on Munic. Corp. (second edition) sec. 417. The more important cases in which Knox County v. Aspinwall has been cited and followed are: Moran v. Miami County, 2 Black, 722, 724, 1862; Supervisors v. Schenck, 5 Wall. 772, 1866; Rogers v. Burlington, 3 Wall. 654; Woods v. Lawrence County, 1 Black, 386; Mercer County v. Hacket, 1 Wall. 83; Meyer v. Muscatine, 1 Wall. 385, 393; Van Hostrup v. Madison City, 1 Wall. 291; Bissell v. Jeffersonville, 24 How. 287; Gelpcke v. Dubuque, 1 Wall. 175, 203; Pendleton County v. Amy, 18 Wall. 297, 1871; St. Joseph Township v. Rogers, 16 Wall. 644, 1872; Lexington v. Butler, 14 Wall. 284; Grand Chute v. Winegar, 15 Wall. 572, 1872. The yet more recent cases are referred to *infra*.

[28] The Town of Coloma v. Evans, Oct. Term, 1875, 3 Cent. Law Jour. 325. The Case of Coloma v. Evans, as to the local officers being constituted a tribunal to determine whether the condition precedent had been complied with, was cited and approved in the subsequent case, at the same term, of Venice v. Murdock, 3 Cent. Law Jour, 322. See, also, *infra*, sec. 13.

[29] Dillon on Munic. Corp. (second edition) sec. 419.

to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal. In Bissell v. Jeffersonville, 24 How. 287, it appeared that the common council of the city were authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the petition of three-fourths of the legal voters of the city. The council adopted a resolution to subscribe, reciting in the preamble that more than three-fourths of the legal voters had petitioned for it, and authorized the mayor and city clerk to sign and deliver bonds for the sum subscribed. The bonds recited that they were issued by authority of the common council, and that three-fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently brought by an innocent holder for value, to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three-fourths of the legal voters of the city had not signed the petition for the stock subscription. A similar ruling was made in Van Hostrup v. Madison City, 1 Wallace. 291, and in Mercer County v. Hacket, 1 Wallace, 83. The same principle has recently been asserted in this court, after very grave consideration, and it must be considered as settled. In St. Joseph Township v. Rogers, 16 Wall. 644, it is stated thus: 'Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions or qualifications, but if it appears by their recitals that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all these recitals were incorrect will not constitute a defence for the corporation in a suit on the

bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification, which it is alleged was not fulfilled.' There is nothing in the case of Marsh v. Fulton County, 10 Wall. 676, at all inconsistent with the rule thus asserted. In that case there were *no* recitals in the bonds, and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed. The question was, therefore, open. What we have said disposes of the present case without the necessity of particular consideration of the matters urged in the argument of the defendant below. It was inadmissible to show what was attempted to be shown, and even if it had been admissible, the effort to assimilate the case to Marsh v. Fulton County would fail. There the subscription was for the stock of a different corporation from that for which the people had voted."[30]

[30] Town of Coloma v. Evans, *supra*. In this case, legislative authority was given to the town to make the subscription and issue the bonds on the previous sanction of a popular vote, to be ascertained, as the court construed the enactment, by the officers of the town, who were empowered to execute the bonds. The bonds were executed in due form by the proper officers, and duly registered with the auditor of state, and contained the *recital* that they "*are issued under and by virtue of the act incorporating the railroad company*," approved March 24th, 1869, "*and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law.*"

The scope and effect of the doctrine of the court are illustrated by the following brief separate opinion in the case, given by Mr. Justice Bradley, who says:

"I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of Knox County v. Aspinwall, to wit: that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed, is conclusive proof of its performance. If, when the law requires a vote of tax-payers, before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute and who does execute the bonds; and if the bonds themselves contain a state-

SEC. 11. *Estoppel by recital—Failure to give notice of election, or notice for the required time.*—As showing the application and effect of the doctrine stated in the preceding sec-

ment or recital that such vote has been given, then the *bona fide* purchaser of the bonds need go back no further. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital, is not, in my judgment, conclusive. It may be *prima facie* sufficient; but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject, and I do not think that the contrary has ever been decided by this court. There have been various *dicta* to the contrary, but the cases, when carefully examined, will be found to have had all the prerequisites necessary to sustain the bonds, according to my view of the case. This view was distinctly announced by this court in the case of Lynde v. The County of Winnebago, 16 Wall. 13. In the case now under consideration, there is a sufficient recital in the bond to show that the proper election was held and the proper vote given; and the bond was executed by the officers whose duty it was to ascertain these facts. On this ground, and this alone, I concur in the judgment of the court."

In the same case Mr. Justice Strong, in the main opinion, after resting the judgment on the principle stated in the text, makes this reference to the case of Knox County v. Aspinwall:

"Indeed, some of our decisions have gone farther. In the leading case of Knox County v. Aspinwall, 21 How. 544, the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions on which the county (in that case) was authorized to issue them had been complied with, and it was said the purchaser was not bound to look farther for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the Royal British Bank v. Turquand, 6 Ellis & Blackburn, 327, a case in the Exchequer Chamber, which fully sustains it, and the decision in which was concurred in by all the judges. This position taken in Knox County v. Aspinwall, has been more than once reaffirmed in this court. It was in Moran v. Miami County, 2 Black, 732; in Mercer County v. Hacket, 1 Wall. 83; in Supervisors v. Schenk, 5 Wall. 784, and in Meyer v. Muscatine, 1 Wall. 384. It has never been overruled, and whatever doubts may have been suggested respecting its correctness to the full extent to which it has sometimes been announced, there should be no doubt of the entire correctness of the other rule asserted in Knox County v. Aspinwall. That, we think, has been so firmly seated in reason and authority that it cannot be shaken."

In further explanation we may remark that the *recital* in Knox County

tion as to compliance with conditions precedent—particularly in respect of the very common one of a previous election or the assent of a given proportion of the tax-payers—a brief reference may be made to some of the most recent decisions of the Supreme Court, in which it is evident that the whole subject again underwent thorough consideration. In Humboldt Township v. Long, bonds issued under legislative authority requiring a popular vote at an election of which thirty days notice were to be given, and which contained a recital (made by the officers having the power, as construed, to determine whether the conditions of fact had been complied with and to issue the bonds) to the effect that they were "issued *in pursuance of and in accordance* with the act of the legislature," stating it, were held not invalid in the hands of a holder for value, before due, without notice, because the election was held within less than thirty days after the date of the order providing for it.[31]

v. Aspinwall was in these words: "This bond is *issued* in part payment of a subscription of $200,000, by the said Knox county, to the capital stock, etc., by order of the board of commissioners *in pursuance* of the 3d section of the act, etc., approved January 15, 1849." The act required the previous sanction of a majority of the qualified voters of the county, and the defence was fallure to comply with the statute in respect to the *notices* for the election. And the proposition which has been doubted elsewhere, and from which Mr. Justice Bradley dissents, is contained in the following sentence extracted from the opinion of Mr. Justice Nelson in that case, who, after quoting the foregoing recital in the bond (which it will be seen does not *expressly* state that there was an election), says: "The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power." In Moran v. Miami County, 2 Black, 722, 732, the court say: "We think and adjudge that the recitals in the bonds are conclusive [of compliance with the precedent condition], constituting an estoppel *in pais* upon the defendants in this suit." Other cases to the same effect in the Supreme Court will be adverted to as we proceed. In Marcy v. Oswego Township, U. S. Sup. Court, Oct. Term, 1875, 3 Cent. Law Jour., 389, the doctrine as contained in the text was reasserted almost in the same language.

[31] Humboldt Township v. Long, U. S. Sup. Court, Oct. Term, 1875, 3 Cent. Law Jour. 494. The court thus states the ground of its decision: "The board of county commissioners, who caused the bonds to be issued, were constituted the authority to determine whether the conditions of fact, made by the statute precedent to the exercise of

The principle adopted and the reasoning of the court by which it is sustained, lead, it would seem, logically to the conclusion (although there is, perhaps, no case in the Supreme Court where the *facts* required a direct decision of the point) that where the power to issue the bonds is given upon the condition of a previous vote in favor of the proposition, that the public or municipal officers can, *where no vote whatever has been taken, or the proposition has been voted down*, bind the county or municipality by the *false recitals* in such unauthorized bonds, provided they are issued by the officers entrusted by the statute with the power. Under this doctrine, limitations upon the exercise of the power intended to prevent fraud and to secure a compliance with the conditions upon which the bonds are authorized, are of little practical value, and generally prove illusory.

So in Coloma v. Evans, *supra*—a case from Illinois—the

the authority granted to execute and issue the bonds, had been performed, and their recital in the bonds issued by them is conclusive in a suit against the township brought by a *bona fide* holder." (So held in Marcy v. Township of Oswego, at this term, 3 Cent. Law Jour. 389; see *infra*, sec. 13.) "In so ruling we but decided what had often before been decided, and what ought to be regarded as a fixed rule. Applying it to the solution of the question now before us, it is plain that the bonds are not invalid because *all the notice* of the popular election was not given which the legislative act directed. The election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power. Whether that step had been taken or not, and whether the election had been regularly conducted, with sufficient notice, and whether the requisite majority of votes had been cast in favor of a subscription, and consequent bond issue, were questions which the law submitted to the board of county commissioners and which it was necessary for them to answer before they could act. In the present case the board passed upon them and issued the bonds, asserting by the recitals that they were issued 'in pursuance of and in accordance with the act of the legislature.' Thus the plaintiff below took them, without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments." See Town of Elmswood v. Marcy, U. S. Sup. Court, Oct. 1, 1875, see *infra*, sec. 13; St. Joseph Township v. Rogers, 16 Wall. 644, 664, 1872.

local officers of the town were empowered by the statute to issue bonds, provided a majority of the voters of the town voted for the subscription, which fact, the statute provided, shall appear by the statement of the town clerk, filed with the county clerk, showing the vote given, the amount voted, and the rate of interest: it was held in favor of a *bona fide* owner of the bonds issued containing a recital of an election, that such an owner need not look beyond the recitals made in the bonds by the local officers authorized to issue them for evidence of the existence of the facts *in pais* thus recited, the decision and declaration of that decision in the bonds being conclusive upon the town. The court said: "After all, this is not an open question, as between a *bona fide* holder of the bonds and the township, whether all the prerequisites to their issue have been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided and certified their decision. They have declared the contingency to have happened on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision, and beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency, but whether that has happened or not is a question of fact, the decision of which is by the law confided to others, to those most competent to decide it, and which the purchaser is, in general, in no condition to decide for himself."

SEC. 12. *Condition precedent—Onus probandi—Estoppel by recital.*—In another important case, it appeared that legislative authority was given to certain officers of a town to borrow money to aid the building of a railway, and to issue bonds therefor, provided the written assent of two-thirds of the resident tax-payers should be previously obtained by said town officers and filed in the county clerk's office, with an

affidavit of such officers verifying such assent. A list of assenting tax-payers was filed in the clerk's office, and also the required affidavit; bonds were issued and were in the hands of a holder for value: on the trial the question arose whether the plaintiff must prove the signatures to the assent to be genuine, and it was held by the Supreme Court of the United States, denying Starin v. Genoa, and Gould v. Sterling, 23 N. Y. 439, 456, that no such *onus* rested on him; that the town officers were created a tribunal to determine whether two-thirds of the resident tax-payers had assented, and that on their decision the purchaser might rely without looking further, and that the town was concluded, in favor of an innocent holder, from denying that the condition precedent had been performed.[32]

[32] Town of Venice v. Murdock, U. S. Sup. Court, Oct. Term, 1875, 3 Cent. Law Jour. 322. In The People v. Mead, 36 N. Y. 224, 1867, the decision in Starin v. Genoa and Gould v. Sterling was adhered to by the Court of Appeals of New York, although the court admitted it was contrary to the decisions of the Supreme Court of the United States as to the evidence of the assent of the tax-payers. In Venice v. Murdock, *supra*, Mr. Justice Strong, speaking of Starin v. Genoa and Gould v. Sterling, says: "These decisions are in conflict with the rulings of this court in Bissell v. Jeffersonville, 24 How. 287; Knox County v. Aspinwall. 21 How. 539; Mercer County v. Hackett, 1 Wall. 83, and other cases which we have cited. They are in conflict also with decisions in other state courts. Society for Savings v. New London, 29 Conn. 174; Railroad Company v. Evansville, 15 Ind. 395; Commissioners v. Nichols, 14 Ohio (N. S.) 360. We have carefully considered the reasons given for the judgments in the New York cases, without being convinced by them. They ignore the paramount purpose for which the bonds were authorized by the legislature, and they treat the written assent of the taxables as the authority to the township officers, when, in fact, the power was given by the legislature, and it was only left to the town to determine by the action of two-thirds of the resident taxables whether the supervisors and commissioners might act under the power. In Gould v. Sterling the legislative act required no affidavit to be filed with a statement of the assenting tax-payers, and in Starin v. Genoa the affidavit filed was regarded as merely verifying that the persons whose names appeared on the assents comprised two-thirds of all the resident tax-payers. But it is obvious that if no more than this was meant by the required affidavit, it was wholly useless, for the assessment rolls of the township would have shown as much." And the rule, as stated in Dillon on Munic. Corp.

SEC. 13. *Estoppel by recital to set up defence of an over-issue contrary to the enabling act.*—Among the limitations, or attempted limitations, upon the exercise of the power to issue bonds, one not unfrequently provided is, that the amount voted or issued shall not exceed a specified proportion of the taxable property of the municipality, or such a sum as will require a greater levy of taxes than a specified rate on the taxable property to pay the annual interest on the bonds. The effect of a disregard of this limitation by the officers entrusted by the statute with the exercise of the power, came for the first time before the Supreme Court at the October term, 1875, in a case arising under the legislation of Kansas.[33]

secs. 418, 419, is approved. The case, Venice v. Murdock, is so important in overturning, so far as the Federal courts are concerned, the judgment of the Court of Appeals of New York, and as respects the proposition it establishes, that we reproduce the additional reasons given by the Supreme Court in support of its judgment: "It is very obvious," says Strong, J., "that if the act of the legislature which authorized an issue of bonds in aid of the construction of the railroad on the written assent of two-thirds of the resident tax-payers of the town intended that the holder of the bonds should be under obligation to prove by parol evidence that each case of the two hundred and fifty-nine names signed to the written assent was a genuine signature of the person who bore the name, the proffered aid to the railroad company was a delusion. No sane person would have bought a bond with such an obligation resting upon him whenever he called for payment of principal or interest. If such was the duty of the holder, it was always his duty. It could not be performed once for all. The bonds retained in the hands of the company would have been no help in the construction of the road. It was only because they could be sold that they were valuable. Only thus could they be applied to the construction. Yet it is not to be doubted the legislature had in view and intended to give substantial aid to the railroad company, if a sufficient number of the tax-payers assented. They must have contemplated that the bonds would be offered for sale, and it is not to be believed they intended to impose such a clog upon their salableness as would rest upon it if every person proposing to purchase was required to enquire of each one whose name appeared to the assent whether he had in fact signed it."

[33] Marcy v. Township of Oswego, MSS. U. S. Sup. Court, Oct. term, 1875, 3 Cent. Law Jour. 389. The legislative provision is essential to an accurate understanding of the judgment and view of the court. The act of the legislation under which the bonds purported to have been issued.

The bonds were duly executed, and contained a *recital* of the act, and that they were issued "*in virtue of and in accordance*" with it, and "*in pursuance of and in accordance with the vote* of three-fifths of the legal voters of the township, at an election to be held on" a specified day. The plaintiff was a *bona fide* holder for value, without notice. The defence was that they were voted and issued at one time, as one act, and in payment of one subscription *in excess* of the amount authorized by the statute. The circuit justice of the United States for the circuit distinguished the case from Knox County v. Aspinwall, before referred to, on the ground that the statute imposing the limitation, the order for the election, the proposition submitted, the order for the issue of the bonds and the latest assessment roll were not, properly, matters *in pais*, but were all public, all open and all accessible, and all of record, and if consulted by the purchaser would have shown the bonds to have been voted and issued in violation of the express limitation upon the power contained in the statute. But the judgment of the circuit court was reversed, three judges dissenting, and the defence held unavailing. The case was considered to fall within the principle of the previous decisions. Mr. Justice Strong, speaking for the court, after stating the facts, as we have

was passed February 25, 1870. Laws of Kansas, 1870, p. 189. The first section enacted that whenever fifty of the qualified voters, being freeholders, of any municipal township in any county should petition the board of county commissioners of such county to submit to the qualified voters of the township a proposition to take stock in the name of such township, in any railroad proposed to be constructed into or through the township, designating in the petition, among other things, the amount of stock proposed to be taken, it should be the duty of the board to cause an election to be held in the township to determine whether such subscription should be made; provided, that the amount of bonds voted by any township should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest. The second section directed the board of county commissioners to make an order for holding the election contemplated in the preceding section, and to specify therein the amount of stock proposed to be subscribed, and also to prescribe the form of the ballots to be used. The fifth section enacted that

given them, observed: "In view of these facts, and of the decisions heretofore made by this court, the question can not be considered an open one. We have recently reviewed the subject in the case of The Town of Coloma v. Evans, (*supra*, sec. 10,) and re-asserted what had been decided before, namely, that where legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were

if three-fifths of the electors voting at such election should vote for the subscription, the board of county commissioners should order the county clerk to make it in the name of the township, and should cause such bonds as might be required by the terms of the vote and subscription to be issued in the name of such township, to be signed by the chairman of the board, and attested by the clerk under the seal of the county.

In Marcy v. Township of Oswego, *supra*, bonds to which the coupons were attached contained the following *recital:* "This bond is executed and issued by virtue of, and in accordance with, an act of the legislature of the said state of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25th, 1870,' and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said township of Oswego, at a special election duly held on the 17th day of May, A. D. 1870." Each bond also declared that the board of county commissioners of the county of Labette, of which county the township of Oswego is a part, had caused it to be issued in the name and in behalf of said township, and to be signed by the chairman of the said board of county commissioners and attested by the county clerk of the said county, under its seal. Accordingly, each bond was thus signed, attested and sealed. The bonds were registered in the office of the state auditor, and certified by him in accordance with the provisions of an act of the legislature. His certificate on the back of each bond declared that it had been regularly and legally issued; that the signatures thereto were genuine, and that it had been duly registered in accordance with the act of the legislature.

The defence to the bonds was that there had been an *over-issue*, contrary to the statute. The bond, it will be observed, contains no statement on this point, but it was held by the Supreme Court that the recital in the bonds estopped the township from making this defence against a *bona fide* holder.

The case of Marcy v. Township of Oswego was cited and approved in

invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary condition precedent to any subscription or issue of the bonds, their decision is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive. And this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds has been conditionally granted."[34]

Humboldt Township v. Long, decided at the same term, the court observing:

"There is no essential difference between this case and that. The assessment rolls of the township may have been proper evidence for the consideration of the board of county commissioners when they were enquiring what the value of the taxable property of the township was, but the bonds are not invalid in the hands of a *bona fide* holder by reason of their having been voted and issued in excess of the statutory limit, as shown by the rolls. Whatever may be the right of the township, as against those who issued the bonds, it cannot be set up against a *bona fide* holder of the bonds that the amount issued was too large, in the face of the decision of the board, and their recital that the bonds were issued pursuant to and in accordance with the act of 1870." See *supra*, sec. 11 and note.

[34] In the dissenting opinion of Mr. Justice Miller, (with whom concurred Davis and Field, JJ.,) the view of the court is strongly combatted. A few extracts will show the opinion of the dissentients, and bring into clearer relief the views of the court:

"In the cases under consideration," says Miller, J., "this provision of the statute was wholly disregarded. I am not sure that the relative amount of the bonds, and of the taxable property of the towns, is given in these cases with exactness, but I do know that in some of the cases tried before me last summer in Kansas, it was shown that the first and only issue of such bonds exceeded in amount the entire value of the taxable property of the town, as shown by the tax list of the year preceding the issue. This court holds that such a showing is no defence to the bonds, notwithstanding the express prohibition of the legislature. It is therefore clear that so long as this doctrine is upheld, it is not in the power of the legislature to authorize these corporations to issue bonds under any special circumstances, or with any limitation in the use of the power, which may not be disregarded with impunity. It may be the wisest policy to prevent the issue of such bonds altogether. But it is not for this court to dictate a policy for the states on that subject. The result

These cases afford, perhaps, a more striking illustration than any previously decided by that court, that the purchaser may implicitly rely upon the recitals in the bonds made by the proper officers, that the authority to issue them has arisen,

of the decision is a most extraordinary one. It stands alone in the construction of powers specifically granted, whether the source of the power be a state constitution, an act of the legislature, a resolution of a corporate body, or a written authority given by an individual." * * * * "No such principle has ever been applied by this court, or by any other court, to a state, to the United States, to private corporations or to individuals. I challenge the production of a case in which it has been so applied. In the Floyd Acceptance Cases, 7 Wall. 666, in which the secretary of war had accepted time drafts drawn on him by a contractor, which, being negotiable, came into the hands of *bona fide* purchasers before due, we held that they were void for want of authority to accept them. And this case has been cited by this court more than once without question. No one would think for a moment of holding that a power of attorney made by an individual cannot be so limited as to make anyone dealing with the agent bound by the limitation, or that the agent's construction of his power bound the principal. Nor has it ever been contended that an officer of a private corporation can, by exceeding his authority, when that authority is express, is open and notorious, bind the corporation which he professes to represent. The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the frauds of municipal officers. It is, that whenever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with; and especially and particularly if they make a *false recital* of the fact on which the power depends in the paper they issue, this false recital has the effect of creating a power which had no existence without it. This remarkable result is always defended on the ground that the paper is negotiable, and the purchaser is ignorant of the falsehood. But in the Floyd Acceptance Cases, this court held, and it was necessary to hold so there, that the enquiry into the authority by which negotiable paper was issued was just the same as if it were not negotiable, and that if no such authority existed, it could not be aided by giving the paper that form. In county bonds it seems to be otherwise. In that case the court held that the party taking such paper was bound to know the law as it affected the authority of the officer who issued it. In county bond cases, while this principle of law is not expressly contradicted, it is held that the paper, though issued without authority of law, and in opposition to its express

and that he is under no obligation to consult the records of the municipality, and is not charged with constructive notice of their contents; and this, too, it will be observed, where the recital in the bond was general, and not specific in its nature, and where the facts which would have shown the issue of the bonds to have been illegal were matters appearing upon the public records of the township.

provisions, is still valid. There is no reason in the nature of the condition on which the power depends in these cases why any purchaser should not take notice of its existence before he buys. The bonds in this case were issued at one time, as one act, of one date and in payment of one subscription. All this was a matter of record in the town where it was done.

"So, also, the valuation of all the property of the town for the taxation of the year before the bonds were issued is of record both in that town and in the office of the clerk of the county in which the town is located. A purchaser had but to write to the township clerk or the county clerk, to know precisely the amount of the issue of bonds and the value of the taxable property within the township. In the matter of a power depending on these facts, in any other class of cases, it would be held that before buying these bonds, the purchaser must look to those matters on which their validity depended. They are all public, all open, all accessible,—the statute, the ordinance for their issue, the latest assessment roll. But in favor of a purchaser of municipal bonds, all this is to be disregarded, and a debt contracted without authority, and in violation of express statute, is to be collected out of the property of the helpless man who owns any in that district. I say helpless advisedly, because these are not *his* agents. They are the officers of the law; appointed or elected without his consent, acting contrary, perhaps, to his wishes. Surely if the acts of any class of officers should be valid only when done in conformity to law, it is those who manage the affairs of towns, counties and villages, in creating debts which not they, but the property owners, must pay." * * * "It is easy to say, and looks plausible when said, that if municipal corporations put bonds on the market, they must pay them when they become due. But it is another thing to say, that when an officer created by the law exceeds the authority which that law confers upon him, and in open violation of law issues these bonds, the owner of property lying within the corporation must pay them, though he had no part whatever in their issue and no power to prevent it. This latter is the true view of the matter. As the corporation could only exercise such power as the law conferred, the issuing of the bonds was not the act of the corporation. It is a false assumption to say that the corporation put them on the market. If one of two innocent persons must

SEC. 14. *Estoppel by recital of matter of fact, e. g., date of subscription.*—The effect of recitals in the bonds, and of statements in the records of the county which issued the bonds, is considered in The Town of Concord v. Portsmouth Savings Bank.[35] A controlling question in the case was whether the power to subscribe for stock and issue bonds therefor, given by the act March 26, 1869, was annulled by the new constitution of the state (which took effect July 2, 1870) before the subscription was made or a valid contract to subscribe was completed. The court held that, in point of fact a legal and binding subscription was made, or agreed to be made, in December, 1869, and hence the defence of want of legal power failed; and it then proceeded to view the case as affected by *estoppel*, the plaintiff being a *bona fide* holder for value without notice of any defence. The court held that a recital in the bonds that the subscription was made in December, 1869, being the recital of a matter of fact, and a fact, too, peculiarly, if not exclusively, within the knowledge of the board of supervisors, estopped the county to set up that the subscription was not made until after July 2, 1870, when their authority to subscribe had expired.[36]

suffer for the unauthorized act of the township or county officers, it is clear that he who could, before parting with his money, have easily ascertained that they were unauthorized, should lose, rather than the property-holder, who might not know anything of the matter, or if he did, had no power to prevent the wrong."

[35] Concord v. Portsmouth Savings Bank, U. S. Sup. Court, Oct. Term, 1875.

[36] Town of Concord v. Portsmouth Savings Bank, Sup. Court U. S. Oct. Term, 1875. The point is so material that we subjoin the opinion—delivered by Strong, J.,—on this point. He says: "There is, however, another consideration that is worthy of notice. The findings of the court are that the plaintiff below is a purchaser of the bonds for a valuable consideration, having purchased them before their maturity and without notice of any defence. They were executed by the president of the board of supervisors and the county clerk. They recite that they are issued by the county of Moultrie, 'in pursuance of the subscription of the sum of eighty thousand dollars to the capital stock of the Decatur, Sullivan and Mattoon Railroad Company, made by the board of supervisors of said county of Moultrie, *in December, A. D., 1869, in conformity to the provisions* of an act of the general assembly of the state of Illinois, ap-

SEC. 15. *What constitutes completed subscription or contract to subscribe.*—Interesting questions have arisen as to what constitutes a subscription on the part of a municipality or other public corporation, or a valid contract to subscribe, to the stock of a railroad company, and when rights are vested thereunder which cannot be legislatively impaired without the consent of the parties in interest. Where a precedent popular vote is required, and upon such vote authority is

proved March 26, A. D., 1869.' Now, if it be supposed that the purchaser of bonds with such recitals was bound to look further and enquire what was the authority for the issue, where was he to look? Had he looked to the act of the general assembly of March 26, 1869, he would have found plenary authority for a stock subscription and for the issue of bonds in payment thereof. If he was bound to know that the constitutional provision terminated that authority after July 2, 1870, he knew that any subscription made before that time continued binding notwithstanding the constitution, and that bonds issued in payment of it were, therefore, lawful. If, then, he had enquired whether a subscription had been made before July 2, 1870, at the only place where enquiry should have been made, namely, at the records of the board, he would have found an order to subscribe, equivalent to a subscription made, in December, 1869, corresponding with the assertions of the recitals, and declared by them to have been a subscription. He could have made enquiry nowhere else with any prospect of learning the truth. Every step he could have taken assured him that the recitals were true. How, then, can the county be permitted to set up against a *bona fide* holder of the bonds, that the authority to make a subscription, with all its legitimate consequences, had expired before the subscription was made, in the face of the recitals and of the county records? Whether it had expired was a matter of fact, not of law, and it was peculiarly, if not exclusively, within the knowledge of the board of supervisors. After having assured a purchaser that their subscription was made in December, 1869, when they had power to make it, it would be tolerating a fraud to permit the county to set up, when called upon for payment, that it was not made until after July 2, 1870, when their authority expired."

Purchaser not affected by statements in county records contrary to recitals in the bonds issued by the county. Nicolay v. St. Clair County, 3 Dillon, C. C. R. 163, 1874. In Aller v. Cameron, Ib. 198, the defendant town was held estopped to set up against a holder of its bonds for value, that it was *not legally incorporated.*

Effect of recital by authorized officers. See also Chambers County v. Clews, 21 Wall. 317, 321; Grand Chute v. Winegar, 15 Wall. 355; Lynde v. County of Winnebago, 16 Wall. 6; Railroad Co. v. Otoe

given to subscribe for the stock, the vote without more does not constitute a contract between the municipality thus authorized to subscribe and the railroad company.[37]

SEC. 16. *Same—Power may be annulled by constitutional provision or legislative action before rights become vested.*—As illustrating the necessity of a continued existence of the *power* to issue the bonds, and as showing what did *not* amount to a completed contract before the power was repealed by a constitutional provision, the case of The Town of Concord v. Portsmouth Savings Bank may usefully be referred to.[38] Chronologically stated, the facts were these: The bonds were issued under the act of March 7, 1867, and so recited. The act enacted that certain incorporated towns and cities, and towns acting under the township organization law, (among which it was conceded the town of Concord was one,) should be and were severally authorized to *appropriate* such sum of money as they might deem proper to the Chicago, Danville and Vincennes Railroad Company, to aid in the construction of the road of said company; to be paid to

County, 16 Wall. 667; Mercer County v. Hacket, 1 Wall. 83; Woods v. Lawrence County, 1 Black, 386; Gelpcke v. Dubuque, 1 Wall. 175; Meyer v. Muscatine, Ib. 384; Kennicott v. Supervisors, 16 Wall. 464.

[37] Aspinwall v. County of Jo Daviess, 22 How. 364. *Supra*, sec. 14; *infra*, secs. 16, 17; Town of Concord v. Portsmouth Savings Bank, *infra;* Harshman v. Bates County, 3 Dillon, C. C. R. 150, 162, note; s. c. affirmed in Supreme Court, October Term, 1875. Dillon, Munic. Corp. (2d Ed.) sec. 42 and cases cited.

The *rights of a municipality as a stockholder* in a railroad company, and whose stock has been paid for by the bonds of the municipality, are no greater than the rights of other stockholders, and unless *specially* authorized by the legislature, the railroad company has no power, when receiving the subscription and bonds, to agree to put the municipality in a better position than other stockholders, as, for example, by agreeing to pay a fixed rate of interest on such stock, equivalent in amount to the interest on the municipal bonds issued in payment therefor. Pittsburgh etc. R. R. Co. v. Alleghany County, Sup. Court Pa. Nov. 15, 1874, 3 Cent. Law Jour. 204. Instance in which there was legislative authority for such a contract, see case of the Pittsburgh and Connelsville R. R. Co., 13 P. F. Smith, (Pa.), 126.

[38] Concord v. Portsmouth Savings Bank, U. S. Sup. Court, Oct. Term, 1875; see *infra* sec. 17.

the company as soon as the track of said road should have been located and constructed through said city, town or township respectively. To this was attached the following proviso: "Provided, however, that the proposition to *appropriate* moneys to said company shall be first submitted to a vote of the legal voters of said respective townships, towns or cities, at a regular annual or special meeting, by giving at least ten days' notice thereof; and a vote shall be taken thereon by ballot at the usual place of election, and if the majority of votes cast shall be in favor of the *appropriation*, then the same shall be made; otherwise not." The second section empowered and required the authorities of said municipalities to levy and collect a tax, and make such provisions as might be necessary for the prompt payment of the *appropriation* under the provisions of the law.

The town voted on the 20th day of November, 1869, that it would make a donation, provided the company would run its railroad through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation.

On the 2d day of July, 1870, the new constitution of the state went into operation, by which it was ordained that "no city, town, township or other municipality shall ever become *subscribers* to the capital stock of any railroad or private corporation, *or* make *donation* to, or loan its credit in aid of, such corporation. Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such *subscriptions*, where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption."

On the 9th day of October, 1871, the bonds in suit were executed and delivered as a donation to the railroad company, and the question was whether there was then any existing authority to make the donation and issue the bonds. The Supreme Court, after pointing out that the authority given to the town of Concord by the act of March 7, 1867, (*supra*) was, not to subscribe for stock, but to make an appropriation or donation, which distinction is also taken in the provision of the constitution above quoted, held that no

donation could be made, under the act of 1867, until after the completion of the location and construction of the road through the town: that the vote of November 20, 1869, in favor of an appropriation was not an appropriation or donation; that the power to make such donation was annulled by the constitution on July 2, 1870, and that there was at that date no contract *in esse* between the town and the railroad company which stood in the way of the operation of the constitutional prohibition. As to the effect of the vote of the town, of November 20, 1869, and the acceptance of the railroad company, of June 20, 1870, (both of which, it will be observed, were before the constitution went into operation,) the court observed: "But the town was not empowered to make the donation until the road was located and constructed through the town. It had no authority to make a contract to give. And the acceptance was an undertaking to do nothing which the company was not bound to do before the authority of the town to make a donation, or to engage to make a donation, came into existence. What is called the acceptance of the railroad company cannot be construed as an engagement to locate and build the railroad through the town. It amounted to no more than saying, 'If we build our road through your town, we will receive your gift.' There was, therefore, no consideration for the town's promise to give, even if the popular vote can be considered a promise. There was no contract to be impaired. A contract should be clearly proved before it invokes the protection of the federal constitution. We conclude, then, that at the time the donation was made, there was no authority in the municipality to make a donation to the railroad company, and consequently no authority to issue the bonds. It follows that the bonds and coupons are void."

SEC. 17. *Same—Mode of subscription—When subscription complete.*—Power by legislative act to the board of supervisors of a county to subscribe an amount not exceeding a given sum to the stock of a specified railroad company, and to issue bonds in payment therefor, without requiring the sanction of a popular vote, but with a proviso that the bonds

shall not be issued until the road is open for traffic, gives complete authority to the county to subscribe for the stock, or to make a binding agreement to subscribe therefor preparatory to a final subscription. The proviso that the payment of the subscription should be postponed until the railroad should be opened does not limit the power to subscribe or to enter into an agreement to make the subscription before the road is completed.

And it was held that a resolution of the board of supervisors, made when the power to subscribe existed or had arisen, that the county subscribe a given sum to aid in the construction of the road of the company, without any subscription on the books of the company, amounted to a subscription, or, at all events, to a legal undertaking to subscribe, which, when assented to or accepted by the company, became a binding contract, which the county could not revoke, and which could not be impaired by any subsequent prohibition of the constitution or the legislature, without the assent of the railroad company.[39]

But before any subscription is made, or before any contract to subscribe is completed, the authority to subscribe may be repealed or taken away by legislative or constitutional provision. And if the authority to subscribe depends upon a precedent vote of the people, the *vote*, without a subscription or an agreement to subscribe, does not create a contract, nor preclude the repeal of the authority to make the subscription.[40]

[39] Town of Concord v. Portsmouth Savings Bank, U. S. Sup. Court, Oct. Term, 1875. Compare *supra*, sec. 16.

[40] Aspinwall v. County of Jo Daviess, 22 How. 364, 1859; U. P. R. R. Co. v. Davis Co., 6 Kansas, 256, 1870; Dillon on Munic. Corp. secs. 42, 696, note, and cases there cited; Harshman v. Bates County, 3 Dillon, C. C. R. 162, note. The law on this subject is thus stated and the cases referred to and distinguished, by Mr. Justice Strong, in The Town of Concord v. Portsmouth Savings Bank, *supra*:

"This case [although between the same parties] differs very materially from the case of The Town of Concord v. The Portsmouth Savings Bank, No. 43, of this term. [*Supra*, sec. 16.] In that, we held that the bonds were void because the legislative authority to issue them as a do-

SEC. 18. *Same—Completed subscription—Effect of consolidation of railway companies on validity of subscription.*—The authority to make a subscription and to issue bonds in payment therefor may, if it has never been executed, be revoked by any event which has the legal effect to extinguish the power. Thus where the power to subscribe depends upon a precedent popular vote, and the vote is had in favor of Company A, which under a general law of the state consolidated with Company B, and formed thereby a new company, C, which consolidation was effected *before* any subscription or contract for subscription was made, and the only subscription

nation to the railroad company had been annulled by the constitution of the state before the donation was made." * * * "But a subscription on the books of the company was unnecessary, for that which amounted to a subscription had been made in December, 1869. The authorized body of a municipal corporation may bind it by an ordinance, which, in favor of private persons interested therein, may, if so intended, operate as a contract, or they may bind it by a resolution, or by vote clothe its officers with power to act for it. The former was the clear intention in this case. The board clothed no officer with power to act for it. The resolution to subscribe was its own act; its immediate subscription. Western Saving Fund Society v. The City of Philadelphia, 31 Penn. St. 174; Sacramento v. Kirk, 7 Cal. 419; Logansport v. Blakemore, 17 Ind. 318. In The Justices of Clarke County Court v. The Paris, Winchester and Kentucky River Turnpike Co., 11 Ben. Monroe, 143, it was ruled that an order of the county court, by which it was said the court subscribed, on behalf of Clarke county, for fifty shares of stock in the turnpike company, if concurred in by a competent majority of the magistrates, was itself a subscription, and bound the county. There was no subscription on the books of the company, but the court of appeals said, 'We cannot, therefore, regard this order as a mere offer or pledge to subscribe the fifty shares in this particular road, but as actually taking, and in substance and legal effect subscribing for that number of shares. So in Nugent v. The Supervisors of Putnam County, 19 Wall. 241, it was said that to constitute a subscription by a county to stock in a railroad company, it is not necessary that there be an act of manual subscribing on the books of the company. These cases lead directly to the conclusion that the action of the board of supervisors in December, 1869, was in substance and in legal effect a subscription. And if this conclusion could not be reached, it would make but little difference to the present case, for it could not be doubted that the action of the board was at least an undertaking to subscribe, and this was assented to or accepted by the

made was to the consolidated company, without any new election, it was held that the subscription was unauthorized, and that the bonds which recited these facts were void, even in the hands of a *bona fide* holder for value. The ground of the decision was that the authority to make the subscription ceased by the extinction of the company in whose favor the vote was had, such extinction being the legal consequence of the consolidation.[41] This case differs from Nugent v. The

railroad company. The resolutions were entered of record by the clerk and president of the railroad company, and the company made an appropriation of the bonds to be received in payment of the subscription, by a contract made on the 15th of April, 1870. In either aspect of the case, therefore, there was an authorized contract existing between the county and the railroad company when the new constitution came into operation. No matter whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the constitution. The delivery of the bonds was no more than performance of the contract. For these reasons, it is in vain to appeal to the decisions made in Aspinwall v. The County of Daviess, 22 How. 364, and The Town of Concord v. The Savings Bank, decided this term. In neither of those cases was there any contract made before the authority to make one was annulled. We do not assert that the constitutional provision did not abrogate the authority of the board supervisors to make a subscription for railroad stock. On the contrary, we think it did. But we hold that contracts made under the power while it was in existence were valid contracts, and that the obligations assumed by them continued after the power to enter into such contracts was withdrawn. The operation of the constitution was only prospective. Indeed, it is expressly ordained in its schedule that 'all rights, actions, prosecutions, claims and contracts of the state, individuals, or bodies corporate, shall continue to be as valid as if this constitution had not been adopted.' It is hardly necessary to say that, under the act of the general assembly, the authority to make a subscription was coupled with an authority and a duty to issue county bonds for the sum subscribed. No action of the board was needed after the subscription was made."

[41] Harshman v. Bates County, Sup. Court U. S. Oct. Term, 1875, 3 Cent. Law Jour. 367. The grounds of the judgment of the court on this point are thus succinctly stated by Bradley, J.:

"Another objection to the validity of the subscription for which the bonds were given in this case is, that the township voted a subscription to one company and the county court subscribed to another. This is sought to be justified on the ground that the former company became consolidated with another, thereby forming a third, to whose stock the

Supervisors of Putnam County,[42] in the material circumstance that in that case the subscription to one of the constituent companies was *before* the consolidation, while in this one it was *afterwards*. In this case there was nothing but a bare vote before the consolidation, which, without more, creates no contract between the municipality and the railroad company; while in the Putnam county case there was a subscription in addition to the vote, before the consolidation, and the right, having become vested in the railroad company, may be transferred to another on an authorized consolidation being effected. And where the consolidation is provided for or contemplated by the legislation of the state in force when the subscription is made, a subsequent consolidation, in pursuance of the enactment, does not have the effect to invalidate the subscription. This principle was distinctly settled

subscription was made. This consolidation was effected under a law of Missouri authorizing consolidations, and declaring that the company formed from two companies should be entitled to all the powers, rights, privileges and immunities which belong to either; and it is contended that this provision of the law justified the county court in making the subscription without further authority from the people of the township. But did not the authority cease by the extinction of the company voted for? No subscription had been made. No vested right had accrued to the company. The case of the State v. Linn County Court, 44 Mo. 504, only decides that if the county court refuses to issue bonds after making a subscription, a *mandamus* will lie to compel it to issue them. There the authority had been executed and a right had become vested. But so long as it remains unexecuted, the occurrence of any event which creates a revocation in law will extinguish the power. The extinction of the company in whose favor the subscription was authorized worked such a revocation. The law authorizing the consolidation of railroad companies does not change the law of attorney and constituent. It may transfer the vested rights of one railroad company to another, upon a consolidation being effected; but it does not continue in existence powers to subscribe for stock given by one person to another, which, by the general law, are extinguished by such a change. It does not profess to do so, and we think it does not do so by implication. As sufficient notice of these objections is contained in the recitals of the bonds themselves to put the holder on enquiry, we think that there was no error in the judgment of the circuit court; and it is, therefore, affirmed."

Same case in circuit court, 3 Dillon, C. C. R. 150.

[42] Nugent v. The Supervisors of Putnam County, 19 Wall. 241.

in the Putnam county case just cited,[43] and such existing legislative authority to change the organization controlled the decision and constituted, in the judgment of the court, the ground of distinction between that case and the oft-cited case of Marsh v. Fulton County.[44]

SEC. 19. *Must be a valid act as the basis of the power—Construction of special powers, see note.*—A purchaser of municipal bonds is bound, as has already been incidentally shown, to take notice of any provisions of the constitution or legislation of the state relating to the *power* of the municipality to issue them, and if the act conferring the power is in conflict with the constitution, the bonds are void, even in the hands of a *bona fide* holder for value.[45]

[43] 19 Wall. 241. The principle was followed and applied in Thomas v. Scotland County, 3 Dillon, C. C. R. 7, and in Washburn v. Cass County, 3 Dillon, C. C. R. 251, and the bonds held valid notwithstanding the consolidation.

[44] Marsh v. Fulton County, 10 Wall. 676.

[45] Harshman v. Bates County, U. S. Sup. Court, Oct. Term, 1875, 3 Cent. Law Jour. 367. As the decision in this case is supposed to invalidate all the bonds issued under the Township Aid Act of Missouri, of March 23, 1868, said to amount to nearly $3,000,000, the point on which the act was decided to be unconstitutional will be stated. The constitution of 1865 prohibited such subscriptions "*unless two-thirds of the qualified voters* of the" municipality issuing the bonds "*shall assent thereto.*" Art. 11, sec. 14. The Township Aid Act authorized the issue of bonds "if two-thirds of the qualified voters of the township voting at such election are in favor of the subscription." The Supreme Court hold that there is a broad difference between the constitution and the act—the former requiring the assent of two-thirds of the qualified voters of the municipality, while the latter only requires the assent of two-thirds of the qualified voters who vote at the election. Same case, in the court below, decided on another ground, the constitutional question, being made for the first time in the Supreme Court, is reported in 3 Dillon, C. C. R. 150.

Effect of constitutional provision adopted in 1870, on existing powers to aid railways in *Mississippi*. Woodward v. Calhoun County, (district court of U. S. for Mississippi, Hill, J.,) 2 Cent. Law. Jour. 396. In *Ohio*, Cass v. Dillon, 2 Ohio St. 607; State v. Union Township, 8 Ohio, 94. In *Missouri*, State v. Sullivan County, 51 Mo. 531; Kansas City etc. R. R. Co. v. Aldermen etc., 47 Mo. 349; State v. County Court etc., 48 Mo. 339; State v. Macon County, 41 Mo. 453; Smith v. Clark County, 54 Mo. 58; State v. Green County, 54 Mo. 540; Thomas v. Scotland County,

And the purchaser must also notice the provisions and extent of the legislative enactment on the subject.[46] Thus where authority was given to certain counties lying *north* of the Missouri river, a subscription made and bonds issued under such authority by a county *south* of the river are void in the hands of everybody.[47]

3 Dillon, C. C. R. 7; Nicolay v. St. Clair County, Ib. 163; Hindekoper v. Dallas County, Ib. 171; Jordan v. Cass County, Ib. 185; Foster v. Callaway County, Ib. 201.

[46] *Infra*, sec. 20.

[47] Sherrard v. Lafayette County, 3 Dillon, C. C. R. 236, 1875; S. C. 2 Cent. Law Jour. 347. The case was briefly this: By an act of the legislature of Missouri, a company was incorporated with power to construct a railroad from the town of Louisiana, which is situated on the Mississippi river, *north* of the Missouri river, *to* a point on the Missouri river, and the county court of any county in which *any part of the route* of said road should lie was authorized to subscribe stock to the company, without a vote of the people. Afterwards the new constitution of Missouri went into effect, prohibiting the general assembly (1) from creating corporations by *special* act, except for municipal purposes; (2) from authorizing any county, etc., to become a stock-holder in, or loaning its credit to, any company, association or corporation, *unless two-thirds of the qualified voters should assent thereto.* Subsequently to this, the legislature passed an act purporting to *amend* the charter of the said railroad company, which provided that the county court of any county in which any part of the line of said railroad might be located might subscribe to the stock of said company and issue bonds, etc. Under this act, the county court of Lafayette county, a county lying wholly *south* of the Missouri river, issued, *without a vote of the people*, the bonds from which the coupons here sued on were detached, and several installments of interest had been paid on them: *Held*, 1. That the amendatory act from which authority to issue these bonds is claimed is a *special* act, in effect creating a new corporation, and is hence inhibited by the state constitution. 2. That it was not competent for the legislature, by extending the route of the proposed road beyond the point designated in the original charter, to authorize a county *south* of the Missouri river to incur indebtedness in aid of the road, without a two-thirds vote as required by the constitution. 3. That, since there was an entire want of power to issue the bonds, they were void even in the hands of innocent purchasers. 4. That the fact that the county court had paid interest on these bonds did not estop it from afterwards setting up their invalidity.

Construction of special power. The act which authorized the issuing of the bonds to pay the county subscriptions to a railway company directed that the bonds so issued should be made payable to "the presi-

SEC. 20. *Registration of bonds—Effect of fraudulent antedating.*—The history of the issue of municipal bonds in this country shows that conditions imposed by law requiring a popular vote, or conditions in the propositions submitted to the voters, intended to prevent fraud and to secure the actual building and completion of the roads, have been often evaded, and the bonds issued without compliance therewith. Such bonds, when negotiated for value, the courts, as we have seen, have held to be binding. To prevent such improper or improvident issue of bonds in the future, the legislatures of some of the states have passed acts requiring all bonds to be *registered* with some of the executive departments of the state before they are issued or negotiated. Thus in 1872[48] the legislature of Missouri, a state in which many fraudulent

dent and directors of the railroad company, and their successors and assigns." The bonds issued were made payable to "the railroad company or bearer." *Held*, that the power granted was sufficiently pursued, and that the bonds so issued were valid. Woodward v. Calhoun County, (U. S. Dist. Court for Mississippi, Hill, J.,) 2 Cent. Law Jour. 396, 1874.

Special act held to control general act. R. R. Co. v. Otoe County, 16 Wall. 667, 1872.

Power to donate bonds in lieu of lands and right of way. By various provisions of a city charter, the mayor and city council were authorized to make donations of land for the right of way and other privileges to a railroad company, and to expend money for the purpose of acquiring land to be given, and were authorized to borrow money to an unlimited extent, when instructed so to do by a popular vote, and, further, to issue bonds to fund any indebtedness of the city, existing or to be created. Under this authority, a railroad company, by reason of complying with certain conditions, became entitled to demand from the city the right of way and depot grounds. The company agreed with the city to accept the bonds voted to procure the right of way and grounds in lieu of the right of way and grounds, and it was held that the city had the power thus to agree, and that the bonds were valid. Converse v. Fort Scott, U. S. Sup. Court, Oct. Term, 1875, 3 Cent. Law Jour. 449.

A proposition once voted down may be subsequently re-submitted and adopted, unless the act evinces a contrary intention. Society etc. v. New London, 29 Conn. 174; Smith v. Clark County, 54 Mo. 58; Woodward v. Calhoun County, 2 Cent. Law Jour. 396.

Issue of bonds before law authorizing it took effect. Phelps v. Bank, 13 Wis. 432; Berliner v. Waterloo, 14 Wis. 378.

[48] Act of March 30, 1872, (Laws of Missouri, 1872, p. 56).

bonds had been issued, passed an act which provided that, "*before* any bond, hereafter issued by any county * * * shall *obtain validity or be negotiated*," it must be *first* registered by the state auditor, who shall certify thereon that all conditions precedent required by law, and by the contract under which the bonds were ordered to be issued, have been complied with. In the case of Anthony v. Jasper County,[49]

[49] Anthony v. Jasper County, U. S. Circuit Court, West. Dist. Mo April Term, 1876, 3 Cent. Law Jour. 321. In delivering its judgment, the court said: "If the bonds bore date after the act of March 30, 1872, and had not been registered, it is plain, we think, that they would have no '*validity*,' and hence could not support an action in the hands of any person. But they are antedated, and the question is, whether they have validity in the hands of the innocent purchaser. Upon the best consideration we have been able to give, our conclusion is that the bonds can not be enforced. The case comes within the doctrine, which is well settled, that where a *statute* declares absolutely and without exception that a contract or bond or note is void, it is void into whosesoever hands it may come. This statute declares that no unregistered bond shall be valid or be negotiated. Bonds must *first* be registered. Without registration they '*obtain no validity*.' Such is the statute. A declaration that bonds shall have no validity is equivalent to declaring them to be void. Is the county estopped to set up this defence? We think not. The case is to be distinguished, we think, from those decided by the Supreme Court of the United States, in which it is held that the frauds of the officers cannot be visited upon the innocent bond-holder, and falls within the principle of Bayley v. Taber, 5 Mass. 286. In that case it was held, where a statute enacted that promissory notes of a certain description, 'made or issued' after a specified day, should be 'utterly void, and no action should be sustained thereon,' that it was competent to the makers of such notes, when sued upon notes bearing date *before* the day fixed by the statute, to prove that they were, in fact, made and issued *after* such day. The principle of that case is the same as in the case at the bar, and if that is a sound principle when applied to the individual maker of prohibited paper, it should apply with at least equal force in favor of public bodies, where one or two officers, without the consent of the others, may, as in this case, combine to evade the law—the other officers being innocent of wrongful participation. The principle involved is one of great consequence. For illustration: Loose and general powers have been heretofore given in this state to municipalities and counties to issue such bonds. This power has been taken away by the new constitution. Can the protective provisions of that instrument be evaded and rendered useless by the mere fraudulent act of the officers of the county in ante-

it appeared that bonds were signed, sealed and issued in the manner above appearing, *after* this statute went into effect, and were antedated to a date prior to the passage of that enactment. In point of fact, the conditions on which the bonds had been voted had not been fully complied with; and hence they could not have been, and were not, certified by the auditor as registered bonds. The bonds found their way into the hands of an innocent holder for value, who did not know that the bonds bore a false date. The circuit court held that the bonds could not be enforced, and that the county was not estopped to set up the defence,—a decision which necessarily implied a distinction between such a case and those in which the Supreme Court of the United States had held that the county or municipality could not visit the frauds of their officers upon the innocent holders of the bonds. The case has gone to the Supreme Court of the United States, and it remains to be seen whether the distinction taken below will be adjudged sound.

SEC. 21. *Retrospective statutes validating irregular subscriptions and bonds.*—In the absence of special constitutional restrictions, the competency of the legislature to enact retrospective statutes to validate an irregular or defective execution of a power by a municipal or public corporation is undoubted.[50] And the power to cure defective subscriptions to the stock of railway companies and validate bonds issued therefor has been frequently exercised and judicially sustained.[51]

dating the bonds? If so, the power to defraud is endowed with a fearful vitality, which survives the prohibitions of the constitution, and threatens to become immortal."

Construction of Kansas Bond Registration Act. January v. Johnson County, 3 Dillon, C. C. R. 392.

[50] Cooley on Const. Lim. 371, and cases there cited; Dillon on Munic. Corp. secs. 46, 352, 424; Ritchie v. Franklin County, 22 Wall. 67, 1874; Cooley on Taxation, 223–232.

[51] Dillon on Munic. Corp. (2d Ed.) sec. 424, and cases there cited. In St. Joseph Township v. Rogers, 16 Wall. 666, where it appeared that the election at which the subscription was approved was held before the passage of the law authorizing the subscription, the court said: "Argument to show that defective subscriptions of the kind may, in all cases, be ratified where the legislature could have originally conferred the power, is

SEC. 22. *General summary of doctrine of the Supreme Court as to estoppel by recitals.*—In passing from this portion of our subject, we may observe that if we have not mistaken the meaning and effect of the leading judgments of the Supreme Court which we have passed in review, they establish the fol-

certainly unnecessary, as the question is authoritatively settled by the decisions of the supreme court of the state (Illinois), and of this court in repeated instances." And again: "Mistakes and irregularities are of frequent occurrence in municipal elections, and the state legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within the competency of legislative authority."

The constitution of Illinois of 1848, Art. IX, sec. 5, declared "that the *corporate authorities* of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." The supreme court of the state (Marshall v. Siliman, 61 Ill. 218; Wiley v. Siliman, 62 Ill. 170—see Dillon on Munic. Corp. secs. 46, 352, 424) decided that, this section having been intended as a limitation upon the law-making power, the legislature could not grant the right of corporate taxation to any but the *corporate authorities*, nor *coerce* a municipal corporation to incur a debt by the issue of its bonds for corporate purposes. And the court held that an act validating an election, irregularly called and notified, to vote upon the question of township subscription, and declaring the same legal and binding, was void. In the opinion of the court, the act was an effort to confer the power of municipal taxation upon persons who were not, by themselves, the corporate authorities in the sense of the constitution, and to compel the town to issue its bonds for railroad stock, by declaring a void proceeding to be a valid subscription. The liability of the township on the same bonds afterwards came before the Supreme Court of the United States in The Town of Elmwood v. Marcy, Oct. Term, 1875, and a majority of the court not vindicating, nor, it, would seem, approving, the decision of the supreme court of Illinois, nevertheless, as there had been, in their view, no conflicting decisions of that tribunal on the point, and as it involved the construction of a "peculiar provision of the constitution of Illinois," they felt bound to follow it, although it was made after the bonds in question had been issued. Clifford, Swayne and Strong, JJ., dissented, on grounds which would seem to be strongly supported in the previous decisions of the court. Supervisors of Marshall County v. Schenck, 5 Wall. 772; Township of Pine Grove v. Talcott, 19 Wall. 666, 677; Railroad Co. v. County of Otoe, 16 Wall. 667; Olcott v. Supervisors, Ib. 678; *infra* sec. 22, note.

lowing principles: — The purchaser is bound to see that there exists legislative authority not in conflict with the state constitution for the issue of the bonds or commercial securities of the municipal, public or *quasi* corporation, and is bound to notice the contents and recitals contained in the instruments; but if such bonds are duly executed by the proper officers, and if these officers are invested, by the true construction of the legislative enactment in that regard, with the power to decide whether conditions precedent have been performed, and the bonds contain a recital that such conditions have been complied with, or a recital which implies such compliance, whether the preliminary conditions consist of facts *in pais* or facts of record—the issue of the bonds, under such circumstances, with such a recital, is conclusive against the municipality as to the fact or facts recited or implied in the recital, and estops it, in an action by an innocent holder for value, before due, to show the contrary. This is the doctrine of the Supreme Court of the United States, and the point in which it differs from the general line of decisions in the State courts is in regard to the evidence of compliance with conditions precedent. In all the cases in the Supreme Court of the United States, that tribunal has held that the municipal or local officers were constituted the judges to decide whether antecedent or preliminary steps or conditions had been complied with, and that their decision stated or implied in the recital was conclusive against the corporate maker, when the bonds have found their way into the hands of innocent holders. The view which holds the local officers a tribunal to make so important a decision rests not upon any express declaration of the legislature to that effect, but is "gathered," by construction, from the supposed intent and purpose of the legislature. Many of the State courts, but not all of them, have taken a somewhat different view. They agree that mere *irregularities*, not relating to the essence of the power, will not affect a *bona fide* holder; but inasmuch as there exists no general power to issue such securities, and as the fact of compliance or non-compliance with condition precedent is usually a matter of which there is a record, the

purchaser of such securities is bound to ascertain whether the power to issue them existed or had arisen, especially where this depends upon matters of which a record is required to be made. The subject is one full of difficulties. If the latter view is sustained, it has the effect to impair the ready salability and market value of the securities. If the former, it has the effect of enabling the local officers in power for the time being to perpetrate, without any effectual preventive in many cases, the most outrageous frauds. On principle, it would seem that the legislative intent to invest local officers, by means of a false recital, with a power so tremendous ought not to be held to exist, unless it is plainly declared or implied, and that more caution in the purchase of these securities than is required by the doctrine of the Supreme Court would promote the interests both of the maker and the purchaser.

And in this class of cases we may remark that the Supreme Court of the United States does not hold itself concluded by decisions of the State courts made *after* the bonds have been negotiated, unless, possibly, where the question is one exclusively depending upon the construction of local and peculiar provisions of the state constitution or enactments.[52]

[52] As to Iowa municipal bond cases and the conflict of opinion between State and Federal courts, see King v. Wilson, 1 Dillon, C. C. R. 555; Gelpcke v. Dubuque, 1 Wall. 175, and cases cited in Dillon on Munic. Corp. (2d. Ed.), sec. 416, *b*. See particularly on this point, Olcott v. Supervisors, 16 Wall. 678; Butz v. Muscatine, 8 Wall. 575, explained; Supervisors v. United States, 18 Wall. 71; Chicago v. Sheldon, 9 Wall. 50; Pine Grove Township v. Talcott, 19 Wall. 666; Town of Elmwood v. Marcy, U. S. Sup. Court, Oct. Term, 1875; *supra*, sec. 21, note, as to peculiar local legislative or constitutional provisions.

In speaking of the *force of the State court decisions* in the Federal courts in this class of cases, Mr. Justice Strong, in Venice v. Murdock, Oct. Term, 1875, holds this language:

"It is argued, however, that the New York decisions [Starin v. Genoa; Gould v. Sterling, 23 N. Y. 439, 456] are judicial constructions of a statute of that state, and, therefore, that they furnish a rule by which we must be guided. The argument would have force if the decisions, in fact, presented a clear case of statutory construction. But they do not. They are not attempts at interpretation. They would apply as well to

SEC. 23. *Laches, acquiescence, payment of interest and retaining the consideration as ground of estoppel.*—The cases we have heretofore considered were those in which the municipality has been held estopped by the recitals in the bonds to show that conditions precedent had not been complied with. We will now advert to *other grounds of estoppel* arising from the acquiescence or acts of the municipal authorities. It is undoubtedly a sound proposition that a municipal corporation, as well as a private corporation, may confirm acts, not *ultra vires*, which it may deem beneficial to it.

As experience shows that the officers of public and municipal corporations do not guard the interest confided to them with the same vigilance and fidelity that characterize the officers of private corporations, the principle of ratification by laches or delay should be more cautiously applied to the former than to the latter. But the principle applies to both classes of corporations, as well as to natural persons. The general doctrine is undoubted that there is ordinarily no estoppel in respect to acts which are in violation of the constitution, or of an act of the legislature, or which are obviously *ultra vires*. The history of the doctrine of *ultra vires* in Great

the execution of powers or authorities granted by private persons as they do to the issue of bonds under the statute of April 16, 1852. They assert general principles, to wit, that persons empowered to borrow money and give bonds therefor, for the purpose of paying it to an improvement company, are not authorized to deliver the bonds directly to the company, a doctrine denied in this court, in the supreme court of Pennsylvania, and even in the court of appeals of New York. People v. Mead, 24 N. Y. 124; The Town of Venice v. Breed, — N. Y. —. They assert, also, that where an authority is given to an officer to execute and issue bonds, (on the assent of two-thirds of the voters of a town, the assent to be obtained by the officer and filed in a public office, with an affidavit verifying the assent,) the verification amounts to nothing, subserves no purpose and that a *bona fide* holder of the bonds is bound to prove that the requisite number of voters did actually assent. They assert this as a general proposition. They do not assert that the statute so declares, or that such is even its implied requisition. There is, therefore, before us no such case of the construction of a state statute by State courts as requires us to yield our own convictions of the right and blindly follow the lead of others, eminent as we freely concede they are."

Britain and in this country makes it difficult to affirm that the rule is without exceptions; and it is the part of prudence and wisdom to keep close to the adjudications without undertaking to formulate, in advance, rules of universal application. As to *irregularities* in the exercise of an express power to issue bonds, and particularly in respect to steps connected with preliminary conditions, the failure of the municipality or tax-payer to enjoin the issue, followed by long acquiescence, especially when this is accompanied by affirmative acts which recognize the validity of the bonds, such as receiving and holding the stock or consideration for the bonds, or paying interest on them for a series of years, has been held to estop the municipality from defending, on the ground of non-compliance with conditions precedent, especially when the bonds, as is usually the case, have been negotiated for value. But there is no case yet decided by the Supreme Court which holds the corporation estopped from setting up a total want of power to issue the bonds. The leading cases on this subject in the Supreme Court are referred to in the note.[53]

[53] As to the effect of *failure to enjoin* the issue of the bonds and of acquiescence in the irregular exercise of the power, see Rogers v. Burlington, 3 Wall. 654, 667; compare dissent on this point, Ib. p. 672; Bissell v. Jeffersonville, 24 How. 300; *supra*, sec. 9; Cooley on Taxation, 548, 549; Butler v. Dunham, 27 Ill. 477; Steines v. Franklin County, 48 Mo. 176, 185; State v. Van Horne, 7 Ohio St. 331; Barrett v. County Court, 44 Mo. 201; Shoemaker v. Goshen Township, 14 Ohio St. 587.

In Supervisors v. Schenck, 5 Wall. 781,—from Illinois—which is an important case on this subject, it appeared that in Illinois, counties were authorized, upon a popular vote, to subscribe for stock and pay therefor in bonds; an election was ordered by the *county court* in a certain county, when it should have been ordered (by reason of a change in the law) by the *board of supervisors;* it was duly held; the proposition was carried; the *supervisors* made the subscription, issued the bonds, received the stock and ordered the levy of taxes, and paid the coupons for nine or ten years; and it was held by the Supreme Court of the United States, in conformity with the doctrine of the State supreme court as first announced but subsequently overruled, that the acquiescence, conduct and acts of the county authorities were a ratification of the bonds, at least when in the hands of an innocent holder, and estopped the county to make the defence that the election had been ordered by the county court instead of the board of supervisors. In view of the facts as stated, the judgment

PART II. OF THE MODE OF ENFORCING PAYMENT OF MUNICIPAL SECURITIES.

SEC. 24. *Mode of enforcing payment—When right to a special tax exists, it cannot be impaired by subsequent legislation.*— The general principles of law concerning the mode of enforcing the claims of creditors, including bond creditors, of municipal corporations have been elsewhere treated of by the

of the court would appear to be sound and open to no criticism, as the objection to the bonds was an irregular exercise of an admitted power in the county, and not a want of power. The recital in the bonds is not given, but it would appear from the opinion that the plaintiff's case also fell within the doctrine of Knox County v. Aspinwall.

In Pendleton County v. Amy, 13 Wall. 297, 1871, decided on demurrer, it did not appear that there was any estoppel by reason of recitals in the bond, nor from subsequent payment of interest, but the pleadings showed that the county had received in exchange for the bonds a certificate of the stock of the railroad company, which it had held for seventeen years before the suit was brought, and still held. The county was authorized to purchase the stock, but only on condition of a popular vote. It was decided by the Supreme Court that purchasing and holding the stock under these circumstances estopped the county to assert against an innocent holder of the bonds that they were issued in disregard of the condition of a popular election, required by the act of the legislature conferring the power. Three of the judges dissented, probably on this point; and certainly the case seems to be an extreme application of the doctrine of estoppel. The bonds (so far as appeared) were without recitals; no payment of interest had been made; a popular vote was made necessary, and the plea alleged that no such vote had ever been had, and that the question of subscription had never been submitted to or voted upon by the people; and the mere receipt and holding of the stock were held sufficient to estop the county to make the defence. We have not been able to reconcile the case, on this point, with Marsh v. Fulton County, referred to in a subsequent portion of this note.

Payment of interest on bonds issued in violation of the constitutional rights of the citizen does not estop the municipality from defending against them. The court says:

"We do not attach any importance to the fact that the town authorities paid one installment of interest on these bonds. Such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest, which was equally unauthorized,

present writer, and it is not designed here to repeat what may there be found.[54] We confine ourselves here to the rights and remedies of *bond* creditors. In ascertaining these, special reference must be had to the legislation under which the bonds were issued. If the legislature authorizes a debt to be created, and provides no special mode for its payment, it is probably a sound proposition that it was contemplated that it should be paid in the usual way in which such debts are paid, viz, by the levy and collection of a tax for that purpose.

In respect of railway aid bonds of municipal and public corporations, the settled rule of law is that the power to issue them must be expressly conferred, and in the legislative act conferring it, or in the general legislation of the state concerning the subject, express provision is usually made, authorizing or requiring the levy and collection of taxes, or of a special tax, to pay the debt thus created. Such provisions are of great consequence, and have often proved to be the

cannot create of itself a power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose." Loan Association v. Topeka, 20 Wall. 655, 667.

The case of Marsh v. Fulton County, 10 Wall. 676, 1870, decides this principle, viz, that where, under the legislation of the state, the county authorities had no power to subscribe for stock and issue bonds therefor, and where (as held) they made the subscription and issued the bonds without the sanction of a popular vote, *the bonds containing no recital*, such bonds are void, and are not ratified by acts of the county authorities, such as appointing agents to participate in the corporate meetings of the railway company, nor by the payment of part of the bonds and the interest on the others for a series of years, and the reason given by the court was that no ratification could be made unless it was authorized by the people—the defect being one of power. Field, J., observed: "They [the supervisors] could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization." Compare Pendleton County v. Amy, *supra*.

[54] Dillon on Munic. Corp. chap. XX, on *Mandamus*, sec. 685, *et seq.* Chap. V of Mr. High's very useful work on Extraordinary Legal Remedies contains a collection and brief statement of the more important cases relating to the writ of *mandamus* as applicable to Municipal Corporations, to which we take pleasure in referring the reader.

sole ultimate legal reliance of the creditor; and they are so far connected with the obligation of the contract as to come under the protection of the Federal constitution, and they cannot be repealed or impaired by subsequent legislation.[55]

Where the statute makes express provision for the payment of bonds by the levy and collection of taxes for that purpose, the bond-holder has a right to stand upon this provision and to call for its enforcement in his favor; and in such cases it is no answer to his application for this purpose that an execution has not been returned *nulla bona*, or that the debtor corporation may have property subject to sale on execution.[56]

SEC. 25. *Remedy of bond-holder is by mandamus, and not in equity.*—The proper mode of enforcing or compelling the performance of the duty of levying and collecting taxes, in such cases, is by *mandamus*, and not by a bill in equity. This was first decided by the Supreme Court in Walkley v. Muscatine,[57] and that tribunal subsequently,[58] under circumstances whice made a strong appeal to its sense of justice, has re-affirmed the principle and refused to exercise *equity jurisdiction* over a repudiating municipality to compel it to pay a judgment, which the process of *mandamus* had proved, (by reason of successive resignations of the municipal officers, aided by the character of the legislation of the state,) for a period of fourteen years, ineffectual to enforce. The court re-asserted the doctrine that the regular and appropriate remedy of the creditor is the writ of *mandamus;* and declared that in legal contemplation, judged by its nature and ordinary results, and not by its failure in exceptional cases, it was an adequate remedy, and that the difficulty of its execution in

[55] Van Hoffman v. Quincy, 4 Wall. 535, is the leading case on this point, but there are numerous others in which the principle has been applied, which are cited and referred to in Dillon on Munic. Corp. secs. 41, 42.

[56] Knox County v. Aspinwall, 24 How. 376, 1869; Benbow v. Iowa City, 7 Wall. 313, 1868; Dillon on Munic. Corp. sec. 686 and notes.

[57] Walkley v. Muscatine, 6 Wall. 481, 1867.

[58] Rees v. Watertown, 19 Wall. 107, 1873; followed and re-affirmed in Heine v. The Levee Commissioners, 19 Wall. 655.

a particular instance afforded no sufficient ground for equitable jurisdiction.

Sec. 26. *Jurisdiction and course of procedure in the federal courts—Execution—Demand—Refusal.*—The remedy of the municipal or county bondholder in the Federal courts is to sue at law and obtain a judgment to establish the validity and amount of his debt.[59] Thereupon it is usual to issue execution if the corporate debtor *can* by law have property subject to execution. On a return of the writ *nulla bona* or unsatisfied, application is made upon an information or relation, under oath, reciting these facts, for a *mandamus* to compel the levy and collection of a tax to pay the judgment. But if the bond-holder is by the statute entitled to a levy of a *special* tax to pay his judgment, and if the duty of levying it has been neglected or refused, it is not necessary that an execution should in such case be returned *nulla bona* in order to give the judgment-creditor the right to a *mandamus*. As the course of procedure in the Federal courts is assimilated to that at *common law*, and is not regulated by state statutes, a *demand* of the respondent, and a *refusal* must be shown, or circumstances which will dispense with the

[59] Heine v. The Levee Comm'rs, 19 Wall. 655, 657, 1873; Town of Queensbury v. Culver, 19 Wall. 83, 92. In such cases the Federal courts have no power to issue a writ of *mandamus* as an *original* proceeding, and hence a bondholder cannot, (as it is held in some of the State courts he may do under certain circumstances,) *before* putting his claim into judgment, apply for a *mandamus*. In the Federal court he *must*, as stated in the text, first obtain his judgment. County of Bath v. Amy, 14 Wall. 244, 1871. Then, upon making the proper relation, he becomes entitled, under what was sec. 14 of the Judiciary act, (now Rev. Stats. sec. 716,) to a writ of *mandamus*, as the appropriate remedy to enforce his judgment. It is, when thus issued, the *final process* to enforce the judgment, and performs, in substance, against municipal corporate debtors the office of a writ of execution, with the operation of which the State courts can no more interfere than they can with the other process of the Federal courts. These are settled principles in the jurisprudence of the United States. The leading case is Riggs v. Johnson County, 6 Wall. 166, 1867, and its principles have been frequently re-asserted and applied. The reader will find the decisions cited, Dillon on Munic. Corp. sec. 693, note.

demand. When a demand is made, it should be upon the corporation or the particular officers whose duty it is, and who have the legal power to comply therewith, and the demand should be for the performance of the *exact duty* due to the creditor, as for example, to levy and collect the necessary tax. It is probable that an execution issued and a demand of the proper officers thereunder for payment, would, ordinarily, be treated as a demand to levy a tax, as it would then, it is supposed, become the duty of the officers to levy the proper tax. At all events, such an effect is in practice usually ascribed to an execution. The prudent and very cautious practitioner could accompany the writ of execution with a specific written demand to levy and collect the tax, and have it served at the same time with the writ of *mandamus*, and the service should be upon *the* officers upon whom the legal duty rests to do the act demanded.

SEC. 27. *Obstacles in way of collection—Resignation of officers—Power of federal court.*—In the enforcement of judgments on municipal bonds, the creditors have encountered obstacles arising or supposed to arise from two decisions of the Supreme Court.—The United States v. Boutwell,[60] and Rees v. City of Watertown.[61] The case against Mr. Boutwell arose when he was Secretary of the Treasury, and was an application in the inferior court for a *mandamus* to compel him to pay a certain order. The writ was refused, and a writ of error taken to the Supreme Court, after which Mr. Boutwell resigned and his successor was appointed. The Supreme Court refused the application to substitute the successor, and one ground of the refusal was, that in the absence of a statute altering the common law rule, the writ of *mandamus* abates by the death, *resignation* or removal from office of the officer to whom it is directed. In the view of the court, the office of a writ of *mandamus* is to compel the performance of a personal duty resting on the respondent: "If he be an officer, and the duty an official one, still the writ is aimed exclusively against him as a person, and *he*

[60] United States v. Boutwell, 17 Wall. 604, 1873.

[61] Rees v. Watertown, 19 Wall. 107, 1873.

only can be punished for disobedience; the writ does not reach the office and cannot be directed to it; it is the personal default of the defendant that warrants the impetration of the writ; it necessarily follows from this that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary."

The Supreme Court in the other case referred to[62] decided, in effect, these propositions: 1. That in the enforcement of his judgment against the municipality, the plaintiff was confined to his remedy at *law* by *mandamus* or otherwise, no ground of equity jurisdiction being made out. 2. That the neglect and refusal of the municipal officers to levy the taxes, their disobedience of the writs of *mandamus* and their resignations to evade the duty of levying and collecting the taxes did not authorize the court to appoint officers of its own to levy and collect them, denying, on this point, Welch v. Ste. Genevieve, 1 Dillon C. C. R. 130, and distinguishing Supervisors v. Rogers, 7 Wall. 175, and Lansing v. County Treasurer, 1 Dillon C. C. R. 522. 3. That it was not competent for the court, in virtue of its general jurisdiction as a court of equity, (there being *no individual liability* on the part of the tax-payers or inhabitants of the municipality to pay the debts of the corporation,) itself to subject individual property within the corporation to pay the judgment—the exclusive remedy being by *mandamus* directed to the municipality or its proper officers, commanding *them* to levy and collect, under the powers vested in them in that behalf, the requisite taxes.[63]

[62] Rees v. City of Watertown, *supra*.

[63] A direct effect of this decision, in connection with the protracted and successful evasion of the City of Watertown, was to encourage municipalities and counties elsewhere to adopt the same mode of escaping payment, viz, by successive and repeated resignations. This was practised to a considerable extent in the state of Missouri by several counties that were burdened with a large indebtedness, but it was measurably checked by the action of the executive of the state, Governor Hardin, in refusing to accept the resignation of the county court judges when he had good reason to believe that the resignation was tendered for this purpose.

SEC. 28. *Distinction between bonds and warrants as to enforcement.*—What we have heretofore said has related to the enforcement of municipal bonds where there is an *express* authority given or duty enjoined to levy a tax or a special tax to pay them. We have adverted in a preceding section[64] to the distinction between negotiable municipal bonds issued under direct authority from the legislature, and ordinary municipal or county orders or warrants. The distinction be-

The case of the Supervisors v. Rogers, 7 Wall. 175, 1868, in which the United States Circuit Court, after the county officers had evaded the law and disobeyed the peremptory writ, directed the *mandamus* to the *marshal* of the United States for the District of Iowa, commanding *him* to levy and collect the taxes named in the writ, and which was sustained by the Supreme Court, is declared in the Watertown case to depend, in this respect, wholly upon a statute of the state of Iowa (Rev. of 1860, sec. 3770). That statute had no special reference to this class of cases, and was simply to the effect that the court, in cases of *mandamus*, "besides or instead of proceeding against the defendant by attachment, may direct that the *act* required to be done *may be done by the plaintiff or some other person appointed by the court.*" The practice of the Federal court in *mandamus* cases is as at common law, and this statute had never been adopted by rule; but it was held "competent to adopt it in the particular case," and that it authorized the court to appoint a third person or officer of its own to levy and collect the required taxes. Looking at this case in the light of the decision and reasoning in the Watertown case and in Heine v. The Levee Commissioners, 19 Wall. 655, and of the above suggestions, it would seem to rest upon a very narrow basis. If the court is without power to make such an appointment without the aid of the statute, it was certainly a very broad and liberal view of the language of that statute to hold, that the "act" contemplated by it included the act of levying and collecting taxes, giving acquittances therefor, and selling property to enforce the payment thereof, and making conveyances to complete the sales. See Heine v. The Levee Commissioners, 19 Wall. p. 661. The statement in the opinion of Nelson, J., that this statute "is but a modification of the law of England and of the New England states, which provide for the execution of a judgment recovered against a county, city or town, against the private property of any individual inhabitant, giving him the right to claim contribution from the rest of the people," can hardly be maintained in view of the decision in the Watertown case, and it seems obvious that the section of the Iowa statute referred to was intended for no such purpose.

[64] *Supra*, sec. 5.

tween the two classes of instruments often becomes important when it is sought to enforce payment by means of *mandamus*. The latter class of instruments not being commercial paper, being in the nature of vouchers to the ordinary creditor and put in the shape of warrants or orders for his convenience, are to be paid in the manner provided by the charter or legislation of the state. The provisions are variant in different charters and in different states. In some of the states these instruments are to be registered and paid in the order of their registration, and there is no provision for the levy of a special tax to pay them; and it is contemplated that as they are issued in payment of the ordinary expenses of the city, town or county, that they are to be paid out of the ordinary revenues or resources. It has recently become quite common for the non-resident holders of such instruments to sue thereon in the Federal courts, hoping to obtain thereby some of the advantages which have been accorded by those courts to the holders of negotiable securities.

Where these warrants or orders have been issued by corporate or *quasi* corporate organizations capable of being sued in the State courts, the Federal courts, so far as our observation has gone, have held that the non-resident owner thereof may also sue thereon in the Federal court, and by its judgment establish the validity and amount of his debt, and such judgment may become the basis of an application made in due form for a writ of *mandamus*, but the writ when so issued will only command the proper officers to discharge the legal duty they owe, under the charter or statute, to the warrant-holder.[65] The Federal courts cannot over-turn or interfere with the policy of the state in respect to the rights or remedies of this class of creditors. The leading case on this subject is The Supervisors of Carroll County v. The United States.[66] Counties in Iowa are authorized to issue for ordinary expenses orders or warrants payable to bearer, and are liable to be sued upon them. The statute limited the power of the county authorities "for ordinary county revenue" to the levy

[65] Jordan v. Cass County, 3 Dillon, C. C. R. 185, 1874.

[66] Supervisors etc. v. United States, 18 Wall. 71.

each year of "not more than four mills on the dollar." It made no provision (as the statute was construed by the supreme court of the state, whose construction was regarded by the Federal courts as binding on them) for the levy of a *special tax* to pay judgments obtained on such warrants. The judgment-creditor in the Federal court claimed that he was entitled to the levy of a *special* tax to pay his judgment. But the Supreme Court of the United States held otherwise, and decided that a return to an alternative writ of *mandamus* by the county authorities, that they had already levied a four-mill county tax for the current year (that being the *maximum* amount allowed by statute) was a sufficient return.[67]

[67] Supervisors etc. v. United States, 18 Wall. 71. The text sufficiently states the principle established by this case. In respect of the local statute of Iowa, (sec. — of the Iowa Revision,) the court distinguished and explained the case of Butz v. Muscatine, 8 Wall. 575,—perhaps it ought to be said it overruled it on this particular point.

The circuit court of the United States for the Eastern District of Arkansas, April Term, 1876, in conformity with the doctrines of the text, upon a review of the legislation of that state touching the indebtedness of counties on *warrants*, and the provisions of the new constitution on the subject of county indebtedness, declared the following propositions:

1. That the county court, in case the county is indebted, owes a legal duty to the creditor or warrant-holder to exert the power of levying taxes to the *maximum* limit allowed by law, if necessary to pay the outstanding indebtedness of the county. The *maximum* rate can in no event be exceeded. Dillon on Munic. Corp. sec. 689, and cases there cited.

2. That a creditor who has obtained a judgment in this court against a county may, after proper demand on the county court to discharge its duty in this regard, and a neglect or refusal on the part of the court to comply with such demand, have a *mandamus* to compel the performance of such duty. There must be such a demand or averment of facts of such a nature as will dispense with the demand.

3. Under the new constitution, (Art. XIV, sec. 9,) as to indebtedness then existing, there is a duty, which creditors may enforce, resting on the county court to levy a tax not exceeding one-half of one per cent. Such tax when levied and collected cannot "be used for any other purpose" than the payment of such indebtedness, (Art. XVI, sec. 11,) and must, according to our present impression, although the court does not hold itself concluded on the point, be collected in money, and not in other warrants.

A judgment-creditor of a county in Missouri whose judgment is based

upon municipal bonds secured by the right to a special tax, who has received under a *mandamus* a county warrant therefor, which is refused payment, may have another *mandamus* to enforce the judgment, and is not bound to take his turn among ordinary county warrant-holders. This ruling coincides with the distinction pointed out in the text. United States v. Vernon County, (Western District of Missouri,) 2 Cent. Law Jour. 771.

JOHN F. DILLON.

DAVENPORT, IOWA, September, 1876.

NOTE. The Town of Concord v, Portsmouth Savings Bank, No. 43, is now reported in 3 Cent. Law Jour. 318.

Town of Concord v. Portsmouth etc. is now reported in 3 Cent. Law Jour. 349.

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